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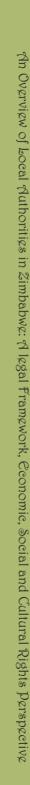
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An Overview of Local Authorities in Zimbabwe:

A legal Framework, Economic, Social and Cultural Rights Perspective

Vakayi Douglas Chikwekwe

## AN OVERVIEW OF LOCAL AUTHORITIES IN ZIMBABWE:

A legal Framework, Economic, Social and Cultural Rights Perspective



A legal Framework, Economic, Social and Cultural Rights Perspective

## Vakayi Douglas Chikwekwe

Cert Ed (UZ), Dip Sp Ed (UZ), MagAd Cert (JC), LLB Hons (MSU), LLM (Westminster London)

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#### **Preface**

This book endeavours to examine the historical background and current position of local authorities in Zimbabwe in light of socio-economic and cultural rights. This is also in light of the core function of local authorities in the provision of service delivery. The book makes an in-depth analysis and articulates the Legal Framework of local authorities in view of good corporate governance in light of societal expectations in a human rights discourse.

The human rights dimension focuses mainly on critical socio-economic and cultural rights as opposed to civil and political rights which are first generation rights. Such rights are of a bread and butter nature and are key components in the realisation of short and long term goals as well as Integration Result Based Management (IRBM) system in Local Authorities in Zimbabwe.

The concept of this book is motivated by the fact that there is no book in Zimbabwe which currently fuses together the historical background, current position and Legal Framework of Local Authorities with socioeconomic and cultural rights in light of service delivery. The concept is also mooted through professional training programme undertaken by the author, courtesy of the Swedish Government, Raoul Wallenberg Institute of Human Rights and Humanitarian Law at Lund University Sweden. A visit to various institutions in Sweden and peer review through cross pollination of ideas added value to the project.

This book will be of assistance to all local authorities in Zimbabwe in terms of jurisprudence in the Human Rights Approach in service delivery of the vulnerable members of society, such as people living with

disabilities and other stakeholders. It seeks to address such key rights as the right to clean and affordable water, the right to shelter and decent housing and the right to food and education.

Thi book is also meant for university students especially those studying Local Governance and Human Rights in Zimbabwe. It gives an insight on how local authorities are run. It is also geared at changing the mindset of those in positions of authority and policy makers so that they inculcate positive attitudes and work towards the realization of economic, social and cultural rights. Zimbabwe is part of the global village it should be pro-active and move with an acceptable dynamic pace in meeting international modern trends and standards as well as progressive realization of the second generation rights.

This book is not exhaustive but only attempts to give a general and broad overview of Local Authorities in Zimbabwe. As already alluded to, it is meant as a guide to University, College Lecturers and Students, Local Government Stakeholders, Human Rights Activists, Mayors, Chairpersons, Councillors, Management, Workers' Union Committee and their representatives as well as Staff Members of Local Authorities and various groups in society. Over and above all this text will be useful as a reference manual during the induction of all new Councillors and Staff members of Local Authorities before taking office. The first port of entry will be at Gweru City Council where the author will use it as part of his key result area in capacitating Council employees and officials.

#### VAKAI DOUGLAS CHIKWEKWE

### **CHAPTER 1**

## Historical Development of Local Authorities in Zimbabwe and Constitutional Provisions

### 1.0 Historical Background

Prior to colonization by the British the existence of local authorities in Zimbabwe was pronounced in the form of traditional structures headed by kings, chiefs, headmen and village heads<sup>1</sup>. The colonization of Zimbabwe by Britain had a profound effect on institutions and the development of local authorities in the country<sup>2</sup>. The British South Africa Company was empowered by the Royal Charter to govern Southern Rhodesia and the company was given a special task to establish institutions as were necessary for the administration of the country<sup>3</sup>. As a component of Local Government, Local Authorities have evolved through a legal framework and transformation since the colonial period. The system has experienced a host of changes and challenges prior to independence in 1980 and during the post-independence era.

Since time immemorial, historical world trends show that it has been trite that local authorities have been concerned with local democracy fundamentaly rooted in the lower tier structures of central government<sup>4</sup>. They are political creatures exercising some form of democracy in their own right<sup>5</sup>. This is due to the fact that central government at times does not reach all the people in terms of governance. Local authorities have therefore been known to be owned by locals exercising some degree of autonomy delegated

by central government. Policies have also been cascaded to the grass roots through local authorities<sup>6</sup>. As a result it has been found to be fit, justified and appropriate to establish such sub-national institutions in Zimbabwe such as the Urban and Rural Councils. Through such institutions, local people have the opportunity to fulfill and exercise their democratic rights in an endeavour to have access to a fair and equitable share of national resources<sup>7</sup>. They have also an opportunity to participate in local development projects.

If one were to walk down memory lane, it is common cause that the historical developments of local authorities in this country became evident and established since the colonisation of the country in the 1890's<sup>8</sup>. This was heralded by the Salisbury Sanitary Board which was established in 1891. The first Municipal Law was passed in 1897 which converted Salisbury and Bulawayo into Municipalities<sup>9</sup>. The Urban Local Authorities were modeled along the Anglo Saxon Parten by the British colonizers. This was along the British tradition in terms of daily functions financial resource allocation, management and control systems<sup>10</sup>.

The urban settlements were established and patterned in terms of the policy of racial segregation in respect of residential areas<sup>11</sup>. Blacks were pushed to poor high density townships such as Mbare, Mufakose, St Marys, Tafara, Dzivarasekwa, Mabvuku in Harare and Mzilikazi and Makokoba Townships in Bulawayo. Some of the poor black Africa townships with poor services and little financial resource allocation in the country included Sakubva, Rimuka, Mambo, Mtapa among others. The minority whites, coloured and those of Asian origins occupied better and well-resourced urban areas such as Belvedere, Borrowdale, Malbelreign, Highlands and

Mount Pleasant among other porsche and leafy suburbs in Zimbabwe.

During the early days of colonisation, the white settler regime seemed to give low priority to the "*Native Reserves*" as compared to the well-structured urban settlements. The only exception was in respect of such fields as dipping where lack of service could have an adverse or detrimental effect negatively impacting on the development of livestock in white areas.

The Native Council Act of 1937 provided for the creation of native Councils to deal with the affairs of the black people<sup>12</sup>. In 1957 during the height of the Federation of Rhodesia and Nyasaland, the white settler regime enacted the African Councils Act. The statute broadened the scope and powers of the Councils<sup>13</sup>. The main emphasis was laid on decision making, which was largely in the hands of and a prerogative of the then white District Commissioner who had the position of President of all Councils in his district and area of jurisdiction.

Driven by the policy of racial segregation, commercial farming areas were a preserve of the white minority of European Descent. Such areas had their own independent administration. Their areas of jurisdiction were administered by road committees, which were later transformed into Rural Councils in 1966<sup>14</sup>. Unlike the African Councils the Rural Councils were accorded powers similar to those of Urban Councils in the categories and spheres of public services<sup>15</sup>.

After a brutal armed struggle, Zimbabwe attained its independence in 1980. Immediately after independence, African Councils were abolished as a means of consolidating power by the black majority.

Fifty-five District Councils were established in place of the abolished African Councils. A dual system in rural areas persisted until 1995. The District Councils and Rural Councils were amalgamated to form 58 Rural District Councils<sup>17</sup>. Since then the legal framework governing the operations of various forms of local authorities in Zimbabwe have been undergoing some transformation. This culminated in the landmark constitutional provisions enshrined in the new constitution of 2013 recognising the existence of local authorities<sup>18</sup>. The progressive constitution therefore guarantees the right of existence, roles, functions and mandates of local authorities in Zimbabwe. The provision of the new constitutional dispensation in light of local authorities has to be realised through political will, implementation and ratification through harmonisation of relevant legislation with the constitution<sup>19</sup>.

#### 1.1 Current Position

Local authorities in Zimbabwe are not mere agents of the central government. They are independent bodies exercising functions conferred on them by the constitution which was ushered in 2013<sup>20</sup>. They are also provided for and enshrined by enabling statutes in their own right. This does not however mean that they are completely free agents because the enabling acts confers certain powers to the Minister of Local Government and the Local Government body to raise the red flag in certain instances and also give directives<sup>21</sup>. Local authorities therefore exercise their powers within the confines or four corners of the enabling statutes. They are not expected to act *ultra vires* for outside the scope of the enabling statutes<sup>22</sup>. If they do so they risk sanctions from the parent Ministry or face equal consequences arising from their conduct. It is therefore

3

important that those who are elected or appointed to hold office in local authorities should familiarize themselves and appreciate the limits of their powers. They should familiarise themselves to the Constitution of Zimbabwe the Urban Council Act, Rural District Councils Act, Labour Act, Public Finance Management Act and the Procurement Act among other relevant Statutory Instruments, Memorandum circulars and General Management books and manuals<sup>23</sup>

Local authorities as alluded above are sovereign only within their powers. This in other words implies that officials of local authorities can only exercise powers conferred by the Act of Parliament. Problems with local authorities usually come when they exercises powers which are not conferred upon or in other words usurp unconferred powers. An example is when a Councillor starts creating stands and parceling them out on sale and pocketing the proceeds. Definitely the Councillor would be usurping powers of Management and risks facing charges of misconduct and abuse of office.

Powers conferred on Local Authorities are capable of being changed at any time by legislation passed by Parliament<sup>24</sup>. They are also subject to the control of the courts within the jurisdiction of Zimbabwe. This is by virtue of the *ultra vires* doctrine which has been noted above. In its simplest form the *ultra vires* doctrine in our own context means where a statute such as the Urban Councils Act confers certain powers on Urban Local Authorities to do A, the Urban Local Authorities do not have powers to do B. If they purport to do B they will act *ultra vires*. Courts however have flexibility in the way they apply aspects of the *ultra vires* doctrine. The operation of the *ultra vires* doctrine is best illustrated in the case of A-G-v Fulham Corpn<sup>25</sup>. The Local Authority in

question had clear statutory powers, under the Baths and Washhouses Acts 1846 to 1848 to run Municipal baths and washhouses. By starting to operate a Municipal laundry (to which the public brought their clothes to be washed not by themselves but by Council employees), it was, however held that it was acting beyond its powers<sup>26</sup>.

Local authorities in Zimbabwe are not mere local organs of the central government. Each local authority has a separate legal existence. It is an artificial *persona* clothed with legal powers to take decisions and to act within the extent of the particular powers endowed and entrusted to it by statute<sup>27</sup>. Each local authority has the right to sue or be sued in its own capacity. It can stand on its own in respect of any legal issues or challenges. In other words they are legal bodies (*Universities*), i.e an aggregate of natural persons forming as a group a new subject of rights and duties, separate and distinct from the rights and duties of the individual persons who constitute the group<sup>28</sup>.

The characteristics and attributes of this legal body are:

- The right of a perpetual succession in title, ensuring continuity of existence independent of any change in the membership of individuals who compose it;
- ii) As noted above, the association of several persons for a common lawful purpose with the object of creating a new juristic personality distinct from the individuals' persons so associating<sup>29</sup>.

Besides having capacity to enter contracts and sue or be sued under its corporate name such legal body is endowed with powers

to purchase, hold and alienate land as well as do and perform such acts and things as bodies corporate may by law do and perform<sup>30</sup>.

Local authorities in Zimbabwe are not absolutely independent since they are creatures of statute<sup>31</sup>. They have certain limitations in that central government through the parent ministry exercises in numerous ways an ever increasing influence over the manner in which local authorities carry on their daily affairs. Central government has intervened on numerous occasions as a way of checks and balances especially where corruption and abuse of office is alleged and proved<sup>32</sup>. It is however a question of debate that local authorities are in law independent entities and are in no sense organs of central government hence should not be interfered with in their daily business<sup>33</sup>. Outside Zimbabwe the history of local authorities has its origins in the history of towns particularly in Europe. Examples are in England and Wales which for centuries king or intermediate overlords; freedom from internal taxes; rights to appoint their own justices<sup>34</sup>, exemption from the jurisdiction of the country justices of the peace. Local authorities in Zimbabwe have powers spelt out in a number of statutes. There are a number of local authorities in Zimbabwe structured as Urban Councils, Local Boards, Town Councils, Municipal Councils and City Councils<sup>35</sup>. Local Authorities exist to govern, represent and provide services to the public. To govern simply means to exercise authority and power;

- 1. To compel citizens to exercise authority and power.
- 2. To pass legislation and to enforce legislation directly or indirectly.

- 3. To take decisions which can affect the rights of other persons;
- 4. To employ staff and to direct their efforts
- 5. To discipline staff, restructure, retrench and dismiss staff
- 6. To allocate and ensure equitable distribution of resources.
- 7. To determine priorities in a budget which it has approved and promote and ensure service delivery in line with best practices.
- 8. To provide health services
- 9. To promote local economic development
- 10. To promote sound environmental management system
- 11. To promote sound local governance
- 12. To provide an efficient strategy for the institution
- 13. To provide overall strategy for the institution
- 14. To promote public participation in local governance
- 15. To provide street lights
- 16. To provide recreation and open spaces
- 17. Provide operations for Fire Brigades and Municipal Police
- 18. Provide water for domestic, commercial and industrial areas etc<sup>36</sup>.

#### To represent means;

- 1. Being sensitive to public opinion. Councillors should ensure that they are always in touch with their wards and the challenges of the electorate.
- 2. Being responsive and proactive. Councillors are under an obligation to consider public needs, to act in advance, to debate the needs and to come to balances decisions based on logic, fairness and justice and not to be partisan or advance interests of their political parties only.
- 3. To carry upward to higher levels of government of those problems which cannot be settled locally because of lack of means.<sup>37</sup>

Local authorities provide a wide range of services with the standard of living of the people.

#### 1.2 Current Structure of Urban Councils

The Urban Councils Act [Chapter 29:15] provides for the establishment of Urban Councils. Urban Councils cover the jurisdiction of urban areas. An Urban area is defined as a human settlement with high population and infrastructure of built environment. Urban areas are created through urbanisation and are categorised by urban morphology as cities, towns, conurbations or suburbs<sup>38</sup>. Examples in Zimbabwe include Harare, Bulawayo, Gweru, Mutare and Kwekwe Cities. In urbanism, the term contrasts with rural areas such as Uzumba Maramba Pfungwe, Chachacha, Musami, Dotito among other villages in Zimbabwe.

Urban Councils have some different status despite being established under the Urban Councils Act. The status is determined by a combination of factors which include the size and population, infrastructure, services offered and social development. There are four different statuses of Urban Councils in Zimbabwe established as a result of different factors. These are cities, municipalities, towns and local boards<sup>39</sup>.

### 1.2.1 City Councils

The Councils with the highest status in Zimbabwe are the councils established in Harare, Bulawayo, Gweru, Mutare, Kwekwe and Masvingo. The population of the people infrastructural development, industry and commercial business have a bearing on the status of these City Councils. The capital city is Harare with the largest population of people followed by Bulawayo.

### 1.2.2 Municipal Councils

Municipal Councils rank third in the hierarchy of urban local authorities. These include, Gwanda, Redcliff. Kariba. Marondera, Victoria Falls, Chinhoyi, Bindura and Chegutu.

#### 1.2.3 Town Councils

Town Councils rank second in hierarchy. These include Norton, Shurugwi, Rusape, Chipinge, Gokwe Chiredzi and Plumtree. These towns grew from service centres in the rural areas to a size sufficient for them to stand alone and manage their affairs.

#### 1.2.4 Local Boards

Local Boards are the fourth and lowest in the hierarch of Urban Councils. These have been established in settlements that have very small population but have the potential to grow into big urban centers. Local Boards in Zimbabwe include, Ruwa, Hwange, Chirundu and Epworth. These virtually require assistance from government in that they were established under special and peculiar circumstances. Epworth and Ruwa could have been established after considering their proximity to Harare, population and services. Hwange is unique in that it caters for a mining population and its proximity to the tourist attraction game reserve. Chirundu is a port of entry with a growing population and it links Zimbabwe with Zambia. Local Boards and Town Councils employ Town Secretaries to head their administration while the Municipal and City Councils are headed by Town Clerks<sup>40</sup>. Different heads of departments deputise the head of administration. Executives or management play the directorate role and are responsible for the implementation of Council policies and decision and for the day to day running of Council affairs

#### 1.3 The Election System

Urban Councils are divided into wards for the purpose of electing representatives known as Councillors. Elections are harmonised and Councillors are mostly elected on political party lines. Municipal and City Councils are headed by Ceremonial Mayors. Ceremonial Mayors do not have Executive powers conferred on them<sup>41</sup>. They hold office on part time basis. Local Boards and Town Councils are headed by Chairpersons who are elected from among Councillors, by Councillors at their first meeting following a general election. The same voting procedure also applies with ceremonial Mayors and their deputies<sup>42</sup>. Irregularities in the election process may upon a petition result in the courts rendering the process a nullity and setting aside the results.

## 1.4 Financing of Urban Councils

Urban Councils in Zimbabwe are mainly self-funding. The main sources of revenue include the levying of assessment rates on immovable properties, money received from sale of water, tariffs or fees for services rendered, health and roads grants, loans for capital projects from central government e.t.c. The Minister may also approve some borrowing powers to source loans from the open market.

#### Other sources of revenue

- Government transfers
- Borrowing
- Income generating projects
- Tax
- Donations

#### 1.5 Rural District Councils

There are around fifty-eight Rural District Councils in Zimbabwe. They are mostly in rural or communal areas as well as the large farming areas scattered around the country. They also cover such remote areas as Muzarabani, Nembudziya, Nyamaropa, Katerere, Musamba Karuma, Hurungwe, Dotito, Maphisa, Kezi, Mataga e.t.c. Rural District Councils are provided for in the Rural District Act [Chapter 29:13].

## 1.5.1 The Election System and Compositions of Rural District Councils

Rural District Councils are creatures of statute. They are divided into wards for the purpose of electing Councillors in terms of the electoral laws of the country. A delimitation exercise is usually carried out in order to establish the ward boundaries. The Rural District Councils are headed by chairpersons, who are elected from among the Councillors, by the Councillors at their first meeting following a general election. Harmonised general elections are held every five years. Prior to 2013 they were held every four years and were not harmonised.

#### 1.5.2 Powers of Rural District Councils

As with Urban Councils, the Rural District Council operates under legislation which confers on them a wide range of powers<sup>43</sup>. The delegated powers conferred on Rural

District Councils by statute include a wide range of social services such as health and education, maintenance of various infrastructures such as sewage works, roads and dams.

However, conflicts may rise in issues of land between Rural District Council and Traditional leaders. They also plan for the overall development of their districts and are involved in the land allocation within their jurisdiction in accordance with the law, while these Rural District Councils enjoy some degree of autonomy, central government provide the policy framework and plays an oversight role.

#### 1.6 Constitutional Provisions

#### 1.6.1 Overview

Zimbabwe is a Unitary Constitutional Democracy. The Constitution of Zimbabwe which was ushered in 2013 is the Supreme law of the Country<sup>44</sup>. It enshrines provisions which provide for local Government. A Constitution is a body of fundamental principles or established precedents according to which a state or other organisation is acknowledged to be governed<sup>45</sup>. It can also be defined as a charter, social code, and canon, body of law or rules. In other words a Constitution consists of basic principles and law of a nation, state, social groups or state organs<sup>46</sup>. It determines powers and duties of government and guarantees certain rights to the people in it<sup>47</sup>.

Historically a Constitution was simply a law, ordinance or decree usually made by a king, emperor or other superior authority<sup>48</sup>. A constitution now usually contains fundamental law and principles which all other laws must conform. The oldest constitution in the history of mankind is that of the Americans<sup>49</sup>. A constitution can be written or unwritten. Unlike the United States of America constitution, the British Constitution is not set out in a comprehensive document<sup>50</sup>. It is not codified into a single document. The Zimbabwean Constitution is a written one while the British one is found out in a number of Statutes (as the Magna Carta) and in common law<sup>51</sup>. The Indian Constitution is the longest in the world.<sup>52</sup>

In the Zimbabwean context the Constitution imposes binding obligations on every person, natural or juristic. It also imposes obligations on the state and all executive, legislative and judicial institutions and agencies of government at every level and must be fulfilled by them. Such obligations are also enshrined in the founding values and principles<sup>53</sup>. The principles of good governance are fundamental and bind the state and agencies of government at National and Local Government level. Local Government means an administrative body for a small geographic area, such as cities and towns. It controls a specific region where it passes or enforces laws that will affect the specific area. Local Government can elect officials, enact taxes, and do many other things that a national government would do, just on a smaller scale.

#### 1.6.2 Tiers of Government

Tiers are the essential components or pillars of a government. The tiers of government in Zimbabwe are provided for in Section 5 of the Constitution. In other words the national government, councils and other local authorities are founded upon Section 5 of the Constitution. The tiers are well defined as;

- a) the national Government
- b) provincial and metropolitan councils and
- c) Local authorities, that is to say
  - i) Urban Councils, by whatever name called, to represent and manage the affairs of people in urban areas and
  - ii) Rural Councils, by whatever name called; to represent and manage the affairs of people in rural areas within the districts into which the provinces are divided.

At national level there is the executive, legislature and judiciary. This is followed by Provincial and Metropolitan councils in line with devolution of governmental powers and responsibilities as provided for by Section 264 s read with Section 265 of the Constitution. At the bottom of the hierarchy are other local authorities represented by Mayors, Councillors and Chairpersons.

#### 1.6.3 Good Governance

The purpose of Local Government is to provide real, sound and meaningful governance<sup>54</sup>.

### Principles of Good Governance are

- Accountability,
- Transparency,
- Service delivery,
- Promotion of Human Rights and
- Gender equality<sup>55</sup>

Local Government as a state institution among other state organs was created to implement laws and policies in line with the national goals of the country. In order to reflect good governance, local government through local authorities has a peremptory duty to adopt and implement national policy and legislation in order to develop competence, accountability, transparency, integrity and probity as provided for in Section 9 of the constitution.

In working towards good governance measures should be taken in regard to appointments to public offices. The guiding principle on recruitment must be merit as opposed to nepotism and favoritism premised on race, bias, religions or ethnic orientation. This should be coupled with putting measures in place to expose, combat and eradicate all forms of corruption and abuse of power by those holding political and public offices as enshrined in Section 9(1) (a) and (b) of the Constitution of Zimbabwe.

In order to achieve the tenets of good governance a wholistic and inclusive approach is needed for the engagement and participation of all stakeholders towards a common purpose and goal. As provided for in Section 9 the state has an obligation under the constitution to provide local government institutions with adequate resources and facilities to enable them to carry out their functions conscientiously, fairly, honestly and efficiently. If the state fails to meet its obligations the aggrieved parties have a right to petition the Constitutional court compelling it to take such measures. It seems there has been no test case in Zimbabwe in regard to this issue since the new Constitution was ushered in 2013.

#### 1.7 Provincial and Local Government:

## **1.7.1.** Devolution of Government Powers and Responsibilities.

Chapter 14, part 1 of the Constitution provides for devolution of government powers and responsibilities. Devolution is the statutory delegation of powers from the central government of a sovereign state to govern at a sub national level, such as a regional or local level. It is a form of administrative decentralisation. Devolved areas have certain powers conferred upon them by the constitution and relevant statutes. In Zimbabwean context devolution implies to the transfer of certain responsibilities from central government to local government by transferring some responsibilities to local government. While provided by the Constitution, devolution in Zimbabwe has taken longer than

expected to be implemented. The harmonisation of relevant statutes with the Constitution has also been of concern thereby leaving a wide gap in the implementation of provisions ushered by the constitutional dispensation.

The concept of devolution has been one of the most contentious, emotive and divisive issue prior to, during and post constitution making process<sup>57</sup>. There is one school of thought who has always argued that devolution would divide the country into small pieces and in turn would cause disunity among the people of Zimbabwe. Another school of thought ascribes to the notion that devolution is about the sharing of the national cake or resources equally and does not have anything to do with secession, separation or tribalism or regionalism. The two schools of thought were well articulated during the debate leading to the 2013 Constitution. Despite the sharp contrast devolution is now enshrined in the Constitution. The implementation and realisation of such devolution can only be tested through taking positive practical steps.

The Preamble to the Provincial and Local Government providing for devolution is coined as;

"Whereas it is desirable to ensure:

- a) the preservation of National Unity in Zimbabwe and the prevention of all forms of disunity and secessionism
- b) the democratic participation in government by all citizens and communities of Zimbabwe and

c) the equitable allocation of national resources and the participation of local communities in the determination of development priorities within their areas;<sup>58</sup>

there must be devolution of powers and responsibilities to lower tiers of government in Zimbabwe."<sup>59</sup>

Section 264 of the constitution provides for the devolution of governmental powers and responsibilities. The objectives are clearly laid out in Section 264(2) as;

- to give powers of local governance to the people and enhance their participation in the exercise of the powers of the state and in making decisions affecting them
- to promote democratic, effective, transparent, accountable and coherent government in Zimbabwe as a whole.
- c) to preserve and foster the peace, national unity and indivisibility of Zimbabwe.
- d) to recognise the right of communities to manage their own affairs and to further their development;
- e) to ensure the equitable sharing of local and national resources; and
- f) to transfer responsibilities and resources from the national government in order to establish a

sound financial base for each provincial and metropolitan council and local authority.

The Constitution provides for the general principles of provincial and local government which include good governance by being effective, transparent, accountable and institutionally coherent among other principles<sup>60</sup>. It also provides for the conduct of employees of provincial and local government who have an obligation to act in accordance with the provisions of the constitution and law<sup>61</sup>. Such officers or employees are not supposed to be office bearers of political parties. They are expected not to act in a biased or partisan manner or violate fundamental rights and freedoms of other people. In light of this the employees should be divorced from politics.

For the purposes of devolution Zimbabwe has been divided into ten provinces. There are two metropolitan provinces which are basically Harare and Bulawayo. Section 268 of the constitution provides for a provincial council for each province, except for the metropolitan provinces of Harare and Bulawayo. It also provides for the qualification for one to be elected into a provincial council. Such a person should be qualified and eligible for election as a member of the National Assembly.

The conducting of elections is provided for under the Electoral law of the country. For each of the metropolitan provinces there is a metropolitan council consisting of;

a) in the case of Bulawayo, the mayor of the city of Bulawayo, who is chairperson of the Bulawayo Metropolitan council;<sup>62</sup>

- b) in the case of Harare.
  - the mayor of the city of Harare, who is the chairperson of the Harare Metropolitan council; and
  - ii) the mayor or chairperson of the secondlargest local authority within the province, who is the deputy chairperson of the Harare Metropolitan council<sup>63</sup>.

Some of the members of the Metropolitan councils are

- all the members of the National Assembly whose constituencies fall within the Metropolitan province concerned;<sup>64</sup>
- ii) the women members of the National Assembly who are elected in terms of Section 124(1) (b) from the Metropolitan province concerned;<sup>65</sup>
- iii) the Senators elected from the metropolitan province concerned and <sup>66</sup>
- iv) the mayors and deputy mayors and the chairpersons and deputy chairpersons, by whatever title they are called, of all local authorities in the metropolitan province concerned<sup>67</sup>.

## 1.7.2 Functions of Provincial and Metropolitan Councils.

In line with devolution of governmental powers and responsibilities as provided for in Section 270 of the Constitution, a provincial or metropolitan council is responsible for the social and economic development of its province. This includes;

- a) planning and implementing social and economic development activities in its province;
- b) coordinating and implementing governmental programmes in its province;
- planning and implementing, and measures for the conservation, improvement, and management of natural resources in its province;
- d) promoting tourism in its province, and developing facilities for that purpose;
- e) monitoring and evaluating the use of resources in its province; and
- f) exercising any other functions, including legislative functions, that may be conferred or imposed on it by or under an Act of Parliament.

It is a requirement that an Act of Parliament should be in place<sup>68</sup>. The purpose is to establish the structure and organogram of staff of provincial and metropolitan councils.

The Act is also required to contain provisions in relation to the manner of exercising functions<sup>69</sup>. As holders of public offices, the Members of a provincial or metropolitan council are accountable, collectively and individually, to residents of their province and the national government for the exercise of their functions<sup>70</sup>.

#### 1.7.3 Committees of Provincial Councils

Provincial and metropolitan councils are empowered to establish committees for the better exercise of their functions. It is only members referred to in Section 268(1) (b) who can preside over the committees. The provincial and metropolitan Council can exercise some discretion in the establishment and naming of the committees<sup>71</sup>. It is submitted that committees such as the Health and Environment, Audit, Finance, Human Resources and General purposes, Engineering, Management, Housing and Community services can be established in order to manage the operations of the councils. Such Committees can be established along the same principles as those in local authorities.

#### **Endnotes**

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- 13 See provisions of the now repealed Africa Councils Act of 1957
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- See provision of the urban Councils Act [chapter: 15]
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- 24. Op cit Note section 130(1)
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### **CHAPTER 2**

## The Urban and Rural Councils' Legal Framework

#### 2.1 Introduction

A legal framework is a doctrine, set of rules, procedural steps or test often established through precedent<sup>1</sup>. In our context the Urban Councils Legal framework highlights the role of the legislature in the creation of laws. It sets out the principles of good governance and the rules of natural justice. It also seeks to explain the major legislative provisions governing Urban Councils Operations.

The Constitution is the supreme law of Zimbabwe<sup>2</sup>. This implies that any law, practice, custom or conduct inconsistent with it is invalid to the extent of the inconsistency<sup>3</sup>. The obligations imposed by the Constitution are therefore binding on every person, natural or juristic. The obligations are also binding on the state and all executive, legislative and judicial institutions and agencies of government at every level<sup>4</sup>. Local authorities are not an exception to such obligations.

Urban Local Authorities are provided for in the Constitution<sup>5</sup>. Their main function is to represent and manage the affairs of people in the urban areas throughout Zimbabwe. They are managed by the Councils composed of Councillors elected by registered voters in the urban areas concerned and presided over by the elected Mayors or Chairpersons.

The Constitution provides for the establishments of different classes of local authorities for different Urban areas<sup>6</sup>. On that same note two or more different Urban Areas may be placed under the management of a single local authority as what used to be with Harare and Chitungwiza prior to and just after independence. The qualification of Mayors and Councillors must be set in the Electoral Law<sup>7</sup>. The Electoral Act provides for the Specific qualifications and procedures as well as the Urban Councils Act and Rural District Councils Act<sup>8</sup>. Such Acts may confer powers on the Mayor or Chairperson of an Urban Local authority, but any Mayor or Chairperson on whom such powers are conferred must be elected directly by registered voters in the areas for which the local authority has been established<sup>9</sup>.

The Constitution provides for the functions of local authorities<sup>10</sup>. It confers powers on Parliament to enact laws to confer various functions such as making by-laws, regulations and rules etc. An example is the enactment of the Urban Councils Acts.<sup>11</sup>

## 2.2 Major Provisions of The Urban Councils Act [Chapter 29:15]

### 2.2.1 Governance of Council Area (Section 38)

Councils are set up to govern areas that are within their boundaries. Governing means to rule or control with authority to conduct the policy and affairs of the Council. The Council is therefore empowered to make policies to govern the Council within the framework of the law. This includes power and authority to do the following:-

- a) to levy taxes on the residents;
- b) to pass by –laws and to enforce them directly or indirectly;
- c) to take decisions which can affect the rights of other persons;
- d) to employ staff and direct their efforts;
- e) to allocate resources and to determine priorities in the council budget.

Schedule 2 to the Urban Councils Act specifies the powers of Council.

### 2.2.2 Establishment and Composition of Council

Councils are established by the President of Zimbabwe through a legal instrument called a proclamation<sup>12</sup>. The proclamation establishing a Council, fixes areas to be covered by the Council; gives a name to the Council and can also divide the Council into any number of Wards<sup>13</sup>.

After the establishment of Council, the Minister of Local Government, Public Works and National Housing determines the number of Councillors who should make up the Council<sup>14</sup>.

The number of Councillors in any Council is not permanent. It can be changed from time to time by the Minister. Usually the review is based on the population growth of the area.

The Minister exercises his powers under this provision through a statutory instrument<sup>15</sup>.

### 2.2.3 Procedure to Apply for Town and City Status

A local authority can apply to the Minister for city status<sup>16</sup>. The Minister will appoint a Commission to consider the matter and make recommendations to him or her

The First Schedule to the Urban Councils Act specifies the matters to be considered in determining an application for Town or City status.

A member of the Commission cannot be a Councillor or employee of the local authority concerned. This is presumably for the purposes of transparency.

The Minister will lay the report of the Commission before Parliament<sup>17</sup>. If Parliament resolves to grant the higher status, it will refer the matter to the President who will, if he considers it appropriate, publish a proclamation in the Government Gazettee granting the new status<sup>18</sup>.

### 2.3 Membership of Councils: elected Councillors (Section 4 A)

Councils are made up of one elected Councillor for each ward.

#### 2.3.1 Term of office of elected Councillors

The election of Councillors is conducted by the Zimbabwe Electoral Commission in terms of the electoral Act<sup>19</sup>. Councils are not involved in the conduct of elections.

An elected Councillor holds office for a period of 5 years. In terms of Section 58 of the Constitution of Zimbabwe, elections for members of the governing bodies of local authorities are to be held concurrently with a general election for Members of Parliament.<sup>20</sup>

Where the seat of an elected Councillor becomes vacant before the expiry of the five years, the Zimbabwe Electoral Commission will conduct a by – election to fill the vacancy for the remainder of the five year period<sup>21</sup>.

## 2.4 Election of Mayor and Deputy Mayor or Chairperson and Deputy Chairperson

2.4.1 A City or a Municipality is led by a Mayor and a Deputy Mayor whilst A Town or a Local Board is led by a Chairperson and a Deputy Chairperson<sup>22</sup>.

In a City or a Municipality, Councillors elect one Councillor or some other person to be Mayor and another Councillor to be Deputy Mayor at the first meeting held in the following circumstances:

- i) after the council is established;
- ii) after a general election of Councillors; and
- iii) after the initial election of Councillors following the incorporation of a rural district Council or a Town Council<sup>23</sup>.

Similarly at the first meeting held in the circumstances outlined above, the Councillors in a Local Board elect one Councillor to be Chairperson and another Councillor to be Deputy Chairperson<sup>24</sup>.

The meeting, at which the elections are held, is chaired by the Provincial Administrator in the case of Harare and Bulawayo and by the District Administrator in the case of other local authorities<sup>25</sup>.

A person elected as Mayor, Deputy Mayor, Chairperson or Deputy Chairperson takes office immediately after his or her election and holds office until his or her successor is elected<sup>26</sup>.

If the Office of Mayor, Chairperson, Deputy Mayor or Deputy Chairperson becomes vacant, the Councillors will elect a successor to serve for the remainder of the term of office<sup>27</sup>.

### 2.4.2 Voting by Secret Ballot

If more than one candidate is nominated for election to the office of mayor, deputy Mayor, Chairperson or Deputy Chairperson, Councillors present at the meeting will vote by secret ballot.

If there is an equality of votes, the election will be determined through the drawing of lots<sup>28</sup>.

## 2.5 Functions of Mayor or Chairperson

- 2.5.1 The functions of Mayor are provided in the Urban Councils Act as follows;
  - a) he or she presides at all meetings of Council at which he is present and in the event of an equality of votes, he has, in addition to a deliberate vote, a casting vote.<sup>29</sup>
  - b) he or she may convene a Special meeting of Council and he or she must do so if requested in writing by not less than one third of the total membership of Council or six Councillors whichever is less; [Section 84 (3)];
  - c) he signs the minutes of Council [Section 88 (3)];
  - d) he presides at any meeting of voters called in term of Section 318 of the Act;
  - e) he signs and certifies the general and supplementary valuation rolls [Section 262 (a)];

- f) he may suspend the Town Clerk from duty as laid down in the Act [Section 133];
- g) he receives from the Town Clerk notification of the suspension of a senior official [Section 140(3)];
- h) he may direct the transfer of funds from one another to another within the Council budget if he considers it necessary in the interests of the residents.
- i) he may authorise expenditure and report to the Council in retrospect if the expenditure was to the interest of the Council [Section 287 (8)]
- j) he authenticates or executes any order, notice or other document requiring authentication or execution by Council.

## 2.5.2 Non-Statutory Functions of Mayor

There are other functions which are not legislates but are inherent in the position of Mayor.

These include the following;

- a) His or her position is an office of dignity and he or she represents the City /Town at all levels of society.
- b) The Mayor does not concern himself or herself with details of administrative or political activity and any intervention is confined to emergencies and then only in a non-controversial way.
- c) He or she represents Council to the public.
- d) He or she leads negotiations with other bodies.
- e) He or she issues press statements reflecting the council's views and decisions;

- f) He or she heads delegations to central government;
- g) He or she is the social and ceremonial head of Council;
- h) He or she is provided with robes of office and a chain, which he wears on civic or ceremonial occasions.
- He or she is the person who most often initiates, sponsors or acts as patron for philanthropic or welfare causes.

## 2.5.3 Functions of Deputy Mayor or Deputy Chairperson

The Deputy Mayor or Deputy Chairperson performs the functions of Mayor or Chairperson whenever the office of Mayor or Chairperson is vacant or if the Mayor or Chairperson is absent or incapacitated or fails to act<sup>30</sup>.

## 2.5.4 Absence of both Mayor and Deputy Mayor or Chairpersons and Deputy-Chairperson

If both the offices of Mayor and Deputy Mayor or Chairman and Deputy Chairman are vacant or if they are both absent and otherwise unable to perform their functions, the Council will appoint one Councillor to perform the functions of the Office<sup>31</sup>.

## 2.5.5 Allowances for Mayor, Deputy Mayor, Chairperson and Deputy Chairperson

The Council pays allowances to the Mayor, Deputy Mayor or Chairperson and Deputy Chairperson. The allowances should not exceed a rate at which the Minister may prescribe through a statutory instrument. The allowances are intended to cover general and personal expenses to the office<sup>32</sup>.

### 2.6 Suspension and Dismissal of a Councilor [Section 114]

The Minister can suspend a Councillor for any one of the following reasons;

- a) If the Minister suspects that the Councillor has breached any of the provisions of the Prevention of Corruption Act [Chapter 9:16]
- b) If the Minister suspects that the Councillor has breached Section 107, 108 or 109 of the Urban Councils Act. Section 107 requires a Councillor who has a financial interest in a matter under consideration by Council, to declare his interest to Council and to move out of the meeting while that matter is under consideration. Section 108 prohibits Councillors from providing any professional services for Council or against Council either personally or through his business partner or his employee. Section 109 prohibits a Councillor either personally or through his business partner or employee, from appearing on behalf of anybody before various boards which are established by Council.

- If the Councillor has committed any offence or crime involving dishonesty relating to involving Council funds or other property; or
- d) If a Councillor has been responsible for the loss of Council funds or property through his negligence or has been responsible for gross mismanagement of property or affairs of Council;
- e) If a Councillor failed to leave his seat if it has become vacant through the operation of the law.

The Minister should always have reasonable grounds for suspecting that a Councillor has contravened the law before he suspends him or her.

The Minister suspends a Councillor through a letter written to the Councillor and to the Council<sup>33</sup>.

A Councillor who is suspended by the Minister can no longer perform his or her functions as Councillor<sup>34</sup>.

The Minister can also stop the payment of the Councillor's allowance during the period of suspension<sup>35</sup>.

The Minister must conduct a thorough investigation soon after suspending a Councillor. The maximum period the Minister can take to complete the investigation is (45) forty five days<sup>36</sup>.

If the Councillor is found guilty after the investigation, he or she may be dismissed by the Minister<sup>37</sup>.

A Councillor who is dismissed from Council cannot stand for election until after five years <sup>38</sup>.

### 2.7 Appointment of Caretakers to Act as Council

The Minister can appoint caretakers to run a Council if there are no elected Councillors or if all the elected Councillors have been suspended or imprisoned or are unable to exercise their functions<sup>39</sup>.

The Minister can appoint up to three persons to act as caretakers<sup>40</sup>. Caretakers can exercise the powers of Council except that they cannot levy rates or other tariffs or sell land without the Minister's approval<sup>41</sup>. The appointment of a caretaker terminates as soon as there are Councillors who are able to exercise their functions or after a period of ninety days whichever occurs first<sup>42</sup>.

The Zimbabwe Electoral Commission is obliged to hold an election for the Council before the termination of office of the caretaker<sup>43</sup>. The Minister can authorise the payment of a salary to a caretaker from the funds of Council at a rate set by the Minister<sup>44</sup>.

## 2.8 When does the seat of a Councillor become vacant before his term of office expires?

The seat of Councillor can become vacant before he or she has completed his or her term of office.

This occurs in the following circumstances:

- a) If a Councillor dies;<sup>45</sup>
- b) Where a Councillor resigns;<sup>46</sup>

- c) If a Councillor is convicted of any offence and is sentenced to imprisonment for a period of six months or more without the option of a fine;<sup>47</sup>
- d) If a Councillor is no longer qualified to be a Councillor in terms of the Electoral Act;<sup>48</sup>
- e) If a Councillor is absent from Ordinary meetings of a Council for two months in succession without leave;<sup>49</sup>
- f) If the Councillor is absent from Committee Meetings for two months in succession without leave;<sup>50</sup>
- g) If a Councillor is absent from Ordinary meetings of Council for six months in succession whether or not he has obtained leave.<sup>51</sup>

The Minister can excuse a Councillor who has been absent for the periods specified in paragraphs (e) (f) (g) above if the Council makes an application to him to do so and gives good reasons why the Councillor should be excused<sup>52</sup>.

#### 2.8.1 Council and Committees of council

Councils works through a system of committees. Each committee is appointed to deal with specific sections of the work of Council<sup>53</sup>.

There are committee which are compulsory for all Councils in terms of the Urban Councils Act. These are as follows;

- Finance,
- Environmental Management,
- Health and Housing and
- ❖ Audit<sup>54</sup>.

Every Council is also required to appoint a Procurement Board which will be responsible for the procurement of goods and service<sup>55</sup>.

A Council can appoint additional committees as it considers necessary for the efficient operation of Council.

## **Special Committees**

A Council can appoint *ad hoc* or Special Committees to deal with particular matters. When these matters have been disposed of, the special committee ceases to exist<sup>56</sup>.

#### 2.9 Staff of Council

The administrative functions of Council are carried out by employees of Council who fall under the Town Clerk. The Town Clerk is the Chief Executive Officer of Council.<sup>57</sup>

The Town Clerk works with a team of senior officials who lead the various departments.

## 2.9.1 Appointment of Town Clerk and other Senior Employees

Senior employees are the Town Clerk, Chamber Secretary, Heads of Departments and Deputy Heads of Departments<sup>58</sup>.

Council cannot appoint a senior official unless the person to be appointed has been approved by the Local Government Board<sup>59</sup>.

The Local Government Board is a body established in terms of the Urban Council Act<sup>60</sup>.

#### 2.9.2 Functions of Town Clerk

The Functions of the Town Clerk are Councils Act as follows:

- a) The proper administration of the Council;<sup>61</sup> and
- b) Managing operations and property of the Council;<sup>62</sup>
- c) Supervising and controlling of the employees of the Council in the course of their employment<sup>63</sup>.

The Act further provides the detailed functions of the Town Clerk as follows:

- a) Direct, supervise, appraise, develop and report on the work and conduct of all Council Employees and take appropriate measures to ensure efficiency, and discipline among all Council employees;<sup>64</sup> and
- b) Where so authorised by the Council sign orders, notices, or any document requiring authentication, or execution on behalf of Council<sup>65</sup>.
- c) Recommend to the Council the measure necessary to safeguard the finances and assets of the Council;<sup>66</sup> and
- d) To take such steps as he considers to be necessary for the purpose of giving effect to any resolution of the Council<sup>67</sup> and
- e) Account to the Council for the performance of any tasks entrusted through him to the employees of the Council;<sup>68</sup> and

- f) Make such recommendations to the Council or any committee of the council as he considers to be necessary or desirable to effect economies, improve co-ordination<sup>69</sup> and
- g) Introduce, implement and monitor adequate control system;<sup>70</sup> and
- h) Be responsible for the effectiveness and efficiency of the organization of the Council and co-ordination and where necessary, the integration of its activities and, for such purposes, he may, after consultation with the head of the department concerned, inspect, inquire into and investigate the working and administration of any department or section thereof, either by himself or through any person authorised by him.<sup>71</sup>

## 2.9.3 Heads of Department Responsible for Management of his or her Department

Every Head of Department is personally responsible for the proper, efficient and effective management of his or her department.<sup>72</sup>

Where a Head of Department does not agree with any directive given by the Town Clerk, he or she must comply with the directive and lodge and his/her reservations in writing and lodge and lodge them with the Town Clerk and the Mayor<sup>73</sup>.

Where a Head of Department lodges his or her reservations on a directive given by the Town Clerk, the Town Clerk must lodge his reply in writing with the Mayor<sup>74</sup>.

## 2.9.4 Appointment of employees other than Senior employees

Employees of Council are appointed by the Council acting on recommendations from the Town Clerk. In the case of a Town Council, Council employees are appointed by the Council on the recommendations of the Town Secretary<sup>75</sup>.

Administrative procedures will be followed before recommendations are brought to the Executive Committee or Council to appoint specific candidates. The process of selecting candidates for appointment is an administrative function.

Council is empowered to set conditions of services for the employees. The conditions of service will among other things, specify conduct which an employee is not allowed to engage in during the course of duties. An employee who fails to comply with such a condition commits an act of misconduct and can be subject to disciplinary action<sup>76</sup>.

It is important that the hearing be conducted in an impartial manner.

#### 2.10 Power of Council

2.10.1 Councils exercises their powers within the confines of the laws of Zimbabwe<sup>77</sup>

### 2.10.2 Matters for which a Council can make by-laws

Councils are empowered to make by laws which facilitate the governing of the Council area<sup>78</sup>. By-Laws are subsidiary laws which are published in the form of a statutory instrument and are enforced by the local authority<sup>79</sup>.

By-laws are essential to facilitate effective control by the local authority. It is therefore essential that the by-laws should always be kept updated and effectively enforced by Council staff.<sup>80</sup>

Matters in respect of which a local authority can make bylaws are specified in the third schedule to the urban Council Act, which is attached as Annexure III to this module.

## 2.11 Inquiries and Investigations by Minister

2.11.1 The Minister can appoint one or more persons to investigate any matter relating to a Council if he considers it necessary in the public interest<sup>81</sup>.

A council in respect of which the Minister sets up an investigation should give all information requested and

cooperates with the investigators. The Council which is being investigated pays all the expenses for the investigation<sup>82</sup>. It is a criminal offence for any person to refuse to give information or answer any questions from an investigator<sup>83</sup>.

### 2.11.2 Directions by the Minister on matters of policy

The Minister can give Council directions of a general character on policy matters.

The Minister gives policy directions where he considers it necessary in the national interest<sup>84</sup>. The Minister must inform the Council in writing and the Council can submit its submission to the Minister within thirty days. The Council is, however obliged to comply with the Minister's direction<sup>85</sup>.

## 2.11.3 Minister may reverse suspend, rescind resolutions for decisions of Council

The Minister can direct Council to rescind, reverse or suspend a resolution of the Council if in his view the decision is not in the best interest of the residents or is not in the national interest<sup>86</sup>. The Minister must give the direction in writing and the Council is obliged to comply with the Minister's direction expeditiously<sup>87</sup>.

## 2.12 Other Laws Relating to Operations of Urban Local Authorities

There are other laws which govern various activities of local authorities. The major laws are listed below:

## 2.12.1 Regional, Town and Country Planning Act<sup>88</sup>

One of the major functions of a local authority is to plan for the land use and development of the Council area. A Council is the planning authority for its area. The land use plans for any Council area should be formulated following the provisions of this Act.

The Act empowers Council to formulate a Master Plan for its area.

In addition to the Master Plan, the Council can also formulate Local Development plans for different areas within its boundaries.

The preparation of development plans ensures that the Development of the area progresses in a properly defined manner.

The Act also empowers Council to control development and to stop the unauthorised use of land.

### 2.12.2 Public Health Act<sup>89</sup>

## The Public Health Act makes provision to safeguard public Health.

The Act places an obligation on local authorities to safeguard public health within their areas.

The act requires every local authority to appoint a medical practitioner as medical officer. The medical officer is required to keep himself informed on the Public health and sanitary situation in his area and to advise the local authority.

The Act further requires local authorities to take all lawful and necessary precautions to prevent the occurrence or to deal with the outbreak of communicable or contagious diseases.

Functions relating to safeguarding public health are exercised through the department of Health Services.

#### 2.12.3 Other Relevant Laws

- a) Licensing Act, [Chapter 14:17];
- b) Cemeteries Act [Chapter 5:04];
- c) Environmental Management Act [Chapter 20:27];
- d) Labour Act [Chapter 28:01]
- e) Electoral Act [chapter 2:01]
- f) burial and Cremation Act [chapter 5:03]

## **2.13** The power which is exercised by Urban Councils is derived from Acts of Parliament.

Councils should therefore always operate with-in the confines of the law.

If the regard, Councils should:-

- a) Understand and appreciate the role of Parliament and the authority of laws passed by parliament.
- Be familiar with the laws governing the operations of Urban Councils.
- c) Be familiar with the <u>ultra vires</u> doctrine, the <u>audi alteram</u> partem rule, the need to act reasonable and fairly at all times and never to abuse the power the authority given in terms of the Act.
- d) Know that the Urban Council Act is the Bible which governs the operations of Urban Councils.

### 2.14 Rural District Councils Legal Framework

#### 2.14.1 Overview

The constitution provides for the establishment of rural local authorities to represent and mange the affairs of people in rural area<sup>90</sup>. An act of parliament must provide for;

- a) The establishment of rural local authorities<sup>91</sup>,
- b) The election, by registered voters in the rural areas concerned, of councils to manage the affairs of the local authorities<sup>92</sup>

- c) The election of chairpersons, by whatever title they may be called, to preside over the councils referred to in (b)<sup>93</sup> and
- d) The qualification of members of the Councils<sup>94</sup>.

Different classes of local authorities may be established for different rural areas. Two or more different areas may be placed under the management of a single local authority. The constitution provides for the functions of local authorities. It confers powers on Parliament to enact laws to confer various functions such as making by-laws, regulations and rules etc.

#### 2.14.2 Creations of Rural Council

Rural Council are created by an Act of Parliament<sup>97</sup>. This Statute specifies what Rural District Councils can or cannot do and how they should do it. It is important for officials within District Councils to be familiar with the major provisions of the Rural District Councils Act. This implies that Rural District Councils are creatures of statute and have no other powers other than those conferred upon them by Parliament.

The President may at any time, by statutory instrument;

- a) Declare any area within a province to be a distinct<sup>98</sup>
- b) Assign a name to any district<sup>99</sup>
- c) Alter the boundaries or name of, or abolish any district<sup>100</sup>

Whenever the President considers it desirable he may, by proclamation in the Gazette, do any one or more of the following.

- a) Establish a rural district Council for any district with effect from a date specified in the proclamation <sup>101</sup>.
- b) Assign a name to any Council<sup>102</sup>
- c) After consultation with the commission, divide a Council area into ant number of wards<sup>103</sup>.

Before exercising powers relating to the establishment of Councils the Minister may appoint a commission from residents of the concerned district to make recommendations on such issues as

- a) potentiality of the district for local government
- b) extent of the proposed Council area
- c) ward boundaries within the proposed Council areas.
- d) The number of Councillors to be elected or appointed in terms of Act
- e) The need for area committees for any area within the proposed Council area.
- f) The name of the proposed Council e.t. $c^{104}$

## 2.15 Major Provision of the Rural District Councils Act (Chapter 29:13)

#### 2.15.1 Membership of Councils (Section 11)

Rural District Councils consists of

- a) One elected Councillor for each ward of the Council area; and
- b) Such number of appointed Councillors representing special interests not exceeding one-quarter of the number of elected Councillors.

The Minister may fix the number of the Council by Statutory instrument. He therefore has the discretion to determine the number. The Minister may also consult with the concerned Council and has the discretion to vary from time to time, by statutory instrument, the number of appointed Councillors of a Council.

### 2.15.2 Body Corporate (Section 12)

Rural District Councils which are established by Acts of Parliament shall operate as body corporates. This means that they should have perpetual succession in their own names and shall be capable of suing and being sued.

As body corporate, Rural District Councils as creatures of statute can act within the confines of the enabling act of Parliament and other relevant laws. They have the mandate to perform certain functions and are also liable of their actions or failure to perform certain duties. The property of the Rural District Councils can be attached and sold in execution of any court orders. Such is part of consequences associated with body corporate.

## 2.15.3 Terms of office of Elected Councillors and Re-Election of Councillors (Section 30)

Elected Councillors are required to assume office on the day following the day of their election. In terms of Section 32 they should hold such office until the following day on which a new Councillor is elected for the ward concerned. There are also certain circumstances which can impede a Councillor from completing the term of office. This can be through death of the Councillor, prolonged incarceration in prison, illness rendering perform once of duty impossible or through dismissal from office.

## 2.15.4 Election of Chairperson and Deputy Chairperson (Section 45)

A Rural District Council is led by a chairperson and Vice Chairperson. They can be men or women despite the fact that the Act makes a reference to a Chairman and Vice Chairman. From a legal perspective and interpretation of statutes it seems the intention of the legislature is that man shall include woman. The word Chairperson however is the most appropriate in that it is gender—neutral.

A Chairperson and the Vice Chairperson are elected by the Councillors at the first meeting after every general election. The duties of the Chairperson are to preside over all meeting of the Council and perform other duties as prescribed by the Act. The Vice-Chairperson has the mandate to perform all the functions of the chairperson of the Council.

However the office of the chairperson becomes vacant or the chairperson is absent or incapacitated or refuses or fails to act. Though the act is not specific, such circumstances can be due to incapacitation on health grounds, imprisonment, suspension or dismissal from duty.

In the event that a Council fails to elect a Chairperson or Vice-Chairperson, the Act empowers the Minister to exercise discretion. The Minister may appoint any Councillor to be Chairperson or vice-chairperson, as the case maybe.

#### **Endnotes**

- 1. See NTMC, Capacity Building For local Government and Service Delivery Program. Councillors' Induction Handbook 2013 pages 16-17.
- 2. See Constitution of Zimbabwe Amendment 9No.20) Act 2013 Section 2 (1).
- 3. Ibid
- 4. OP Cit note 2 Section 2 (2)
- 5. Op Cit note 2 Section 5 (b) (c) (i), (ii) and chapter 14 parts (1) (3)
- 6. Ibid
- 7. OP Cit note 2 Section 277 (2)
- 8. See Provision of:
  The Electoral Act (Chapter 2:130 Urban Council Act (Chapter 29:15) Rural District Council Act (Chapter 29: 13)
- 9. Ibid
- 10. Op Cit note 2 Section 276
- 11. Op Cit note 2 Section 276 (2)
- 12. 12 See the Urban Councils Act (Chapter 29:150, section 5 (2)
- 13. OP Cit note 12 Section (6) –(7)
- 14. Ibid
- 15. Ibid
- 16. Op cit note 12 Section 14
- 17. Ibid
- 18. Ibid
- 19. See Section 125 of the Electoral Act 9chapter 2:130 (number 25 of 2004)
- 20. Op Cit note 2 Section 158 (2)
- 21. Op Cit note 2 Section 159
- 22. Op Cit note 12 Section 103
- 23. Ibid

- 24. Ibid
- 25. Ibid
- 26. Ibid
- 27. Ibid
- 28. Ibid
- 29. Op Cit note 12 Section 104
- 30. Ibid
- 31. Op Cit note 12 Section 104 (3)
- 32. Op Cit note 12 Section 105
- 33. Op Cit note 12 Section 114 (1) (e)
- 34. Ibid
- 35. Op Cit note 12 Section 114 (2)
- 36. Op Cit note 12 Section 114 (3)
- 37. Op Cit note 12 Section 114 (4)
- 38. Op Cit note 12 Section 114 (5)
- 39. Op Cit Note 12 Section 80 (1) (a) and (b)
- 40. Ibid
- 41. Op Cit note 12 Section 80 (2) (b) (i)
- 42. Op Cit note 12 Section 80 (3)
- 43. Op Cit note 12 Section 80 (4)

  See also provisions of the Electoral Act (chapter 2:13) (No. 25 of 2004)
- 44. Op Cit note 12 Section 80 (5)
- 45. Op Cit note 12 Section 78 (2) (a)
- 46. Op Cit note 12 Section 78 (2) (b)
- 47. Op Cit note 12 Section 78 (2) (c)
- 48. Ibid
  - See also Section 41 (7)
- 49. Op Cit note 12 Section 78 (d) (i)
- 50. Op Cit note 12 Section 78 (d) (ii)
- 51. Op Cit note 12 Section 78 (e)

- 52. Op Cit note 12 Section 78 (3)
- 53. Op it note 12 Section 96 (1)
- 54. Op Cit note 12 Section 96 (2) (3), (4) and (5) See also Sections 97 and 98 in respect of the Audit Committee and its functions.
- 55. See Provisions of the new Procurement Act which came into effect in January, 2018. Under the new Procurement regulations a Council should put in place a Procurement Management Unit headed by the Town Clerk or Chairperson to procure items and goods for Council below the monetary threshold set by the Procurement Regulatory Authority of Zimbabwe.
- 56. Op Cit note 12 Section 100
- 57. Op Cit note 12 Section 141
- 58. Op Cit note 12 Section 131
- 59. Op Cit note 12 Sections (2), (3) and (4)
- 60. Op Cit note 12 Section 116.
- 61. Op Cit note 12 Section 136 (1) (a)
- 62. Op Cit note 12 Section 136 (1) (b)
- 63. Op Cit note 12 Section 136 (1) (c)
- 64. Op Cit note 12 Section 136 (2) (a)
- 65. Op Cit note 12 Section 136 (2) (b)
- 66. Op Cit note 12 Section 136 (2) (c)
- 67. Op Cit note 12Section 136 (2) (d)
- 68. Op Cit note 12 Section 136 (2) (e)
- 69. Op Cit note 12 Section 136 (2) (f)
- 70. Op Cit note 12 Section 136 (2) (g)
- 71. Op Cit note 12 Section 136 (2) (h)
- 72. Op Cit note 12 section 136 (2) (i)
- 73. Op Cit note 12 section 136 (2) (h) (ii)
- 74. Op Cit note 12 section 136 (2) (h) (iii)
- 75. Op Cit note 12 Section 141 (1) (a) and (b)

- 76. Op cit note 12 Section 141 (2) (a), (b) and Section 141 (3)
- 77. Op Cit note 2 Section 276 (1)
- 78. Op Cit note 2 Section 276 (2) (a)
- 79. Ibid
- 80. Ibid
- 81. Op Cit note 12 Section 311 (2)
- 82. Op cit note 12 section 311 (7)
- 83. Op Cit note 12 Section 311 (11) (a) and (b)
- 84. Op Cit note 12 Section 313
- 85. Ibid
- 86. Op Cit note 12 Section 314
- 87. Ibio
- 88. See provisions of the Regional, Town and Country Planning Act (Chapter 29:12)
- 89. See the Public Health Act (Chapter 15:09)
- 90. Op Cit note 2 Section 275 (1)
- 91. Op Cit note 2 Section 275 (2) (a)
- 92. Op Cit note 2 section 275 (2) (b)
- 93. Op cit note 2 Section 275 (2) (c)
- 94. Op Cit note 2 Section 275 (2) (d)
- 95. Op cit note 2 Section 275 (3)
- 96. Op Cit note 2 Section 276
- 97. Op cit note 2 Section 276 (1)
- 98. See the Rural District Act [chapter 29:13] section 8 (1) (u)
- 99. Ibid section 8 (1) (c)
- 100. Ibid Section 8 (1) (c)
- 101. Ibid Section 9 (1) (u)-(f)

### **CHAPTER 3**

# Role of Local Authorities in the Promotion and Protection of Economic, Social and cultural rights (The Human Rights Based Approach)

Economic, Social and Cultural rights are human rights of a bread and butter nature. By simple definition human rights are rights inherent to all human beings by virtue of being human beings<sup>1</sup>. This is irrespective of nationality, ethnic origin, colour, religion, language, creed or any other status. Human beings are all equally entitled to human rights without discrimination. The rights are all interrelated, interdependent and indivisible<sup>2</sup>.

Human rights are interrelated in that they have a mutual or reciprocal relation or parallelism, correlative or connected. Democracy is a pillar of human rights. It reinforces development and respect for human rights and fundamental freedoms which are interdependent and mutually reinforcing. Rights are said to be indivisible and interdependent which means that inorder to guarantee civil and political rights government must also ensure economic, social and cultural (and vise versa³). The indivisibility principle recognises that if a government or local authority violates rights such as water and health, it necessarily affects people's ability to exercise other rights such as the right to life⁴. All human rights are therefore indivisible whether they are civil and political rights, such as the right to life, equality before the law and freedom of expression, economic, social and cultural rights, such as the rights to work, social security and education, or collective rights, such as the rights to development⁵.

Economic, Social and Cultural rights are an important component of all local authorities in Zimbabwe in their Service Delivery Agenda and Sustainable Development. A new constitutional dispensation was ushered at national level in 2013<sup>6</sup>. Zimbabwe for the first time enshrined economic, social and cultural rights in a justifiable Bill of Rights<sup>7</sup>. This was a move geared at taking significant steps towards meetings its obligations under international law in fulfilling aspirations of the people.

The Zimbabwean government has three main obligations which should also cascade to local authorities under its jurisdiction. These relate mainly to economic, social and cultural rights<sup>8</sup>. First and foremost, it must respect people's rights by not undertaking actions that violate these rights. Secondly, and of equal importance, it must protect people's rights by ensuring that other people or bodies do not violate such rights. Thirdly, and of the same significance, it must fulfill people's rights by taking actions to make them a reality in practice<sup>9</sup>.

A comparative study can be made with South African courts which have developed extensive jurisprudence in the interpretation of its constitution in the progressive realisation of socio-economic rights. <sup>10</sup> The Zimbabwean Courts have on the other hand been criticised of exercising what is termed constitutional avoidance especially in the Constitutional Court as compared to the High Court. A number of cases have not been heard in the Constitutional Court due to technicalities. This problem will however continue to haunt the country because human existence will remain. The indigent people will also remain an integral part of the society. The need for a decent life will exist no matter how rich or poor one is. Poverty will never be totally eradicated in all societies but steps can be taken at national and local level to alleviate the adverse effects of poverty by making budgetary provisions for economic, social and cultural rights.

As compared to the Zimbabwean courts, the South African Courts have managed to exercise judicial independence and judicial activism amidst Socio-economic challenges<sup>11</sup>. To a larger extent, the South African judiciary has managed to give effect to socio-economic rights enshrined in the Bill of Rights<sup>12</sup>. Instead of constitutional avoidance, the South African courts have managed to maintain the balance between judicial independence and judicial activism in giving the judgments which address the socio-economic challenges and resonate within the hearts and minds of the people affected thereby<sup>13</sup>. In the same context, it is submitted that the Zimbabwean courts must be proactive and are reminded that they are charged with making the ultimate decisions which affect the lives, freedoms, duties and properties of fellow human beings.

It has often been stated, times without numbers that the alleviation of poverty and the social and economic transformation of the lives of the poor and marginalized masses hinge, to a great extent, upon the realization of socioeconomic rights<sup>14</sup>.

This was reiterated by the South African Constitutional Court in the case of the <u>Government of RSA-v- Grootboom</u><sup>15</sup>, where the court held that the realization of socio-economic right is:

"..... the key to the advancement of race and gender equality and the evolution of a society which men and women are equally able to achieve their full potential".

In this case people were evicted from informal homes. The court further held that the state has to take positive action to meet the needs of those living in extreme conditions of poverty, homelessness or intolerable housing. In the case of S -v- Makwanyane<sup>16</sup> it was stated that;

"..... the constitution makes it particularly imperative for courts to develop the entrenched fundamental rights in terms of a cohesive set of values ideal to an open democratic society"

These values stated in Section (1) of the South African Constitution, include human dignity, the achievements of equality and the advancement of human rights and freedoms, non-racialism, non-sexism, supremacy of the constitution and the rule of law<sup>17</sup>.

Various arguments were heard against the inclusion of socio-economic rights in the South African Bill of Rights during the Constitutional Courts' Certification of the final constitution. The objectors argued that the inclusion of socio-economic rights would result in the courts dictating to govern how the budget should be allocated <sup>18</sup>. They argued further that this would amount to breach of the principle of separation of powers. In the Certificate of Constitution of South Africa <sup>19</sup>, the court held that, although the enforcement of socio-economic rights may result in orders with budgetary implications, the enforcement of civil and political rights may also result in orders which might affect the budget.

The difference between socio-economic rights and civil and political rights is often said to lie in the nature of the obligations they impose on the state<sup>20</sup>. Socio economic rights are considered to be progressive and imposing positive obligations on the state, while civil and political rights impose negative obligations<sup>21</sup>. In terms of Section 7 (2) of the South African Constitution, the state must respect, protect, promote and fulfill the rights in the Bill of Rights, including socio-economic rights.

The objectors to the inclusion of socio-economic rights into the Bill of Rights in the South African Constitution also challenged the justifiability of these

rights<sup>22</sup>. In its landmark ruling the Constitutional Court held that these rights were at least to some extent justifiable and could at the very least be negatively protected from improper invasion.

Section 3 of the Zimbabwean Constitution is modeled along the South African Constitution. It is founded on respect for the following values and principles

- a) Supremacy of the constitution
- b) The rule of law
- c) Fundamental rights and freedoms
- d) The nation's diverse cultural, religious and traditional values;
- e) Recognition of the inherent dignity and worth of each human being;
- f) Recognition of the equality of all human rights ....."

#### Section 2 (2) of Constitution

The obligations imposed by the Constitution of Zimbabwe are binding on every natural or juristic including all tiers of government. The tiers of government in Zimbabwe are;

### Section (5) of Constitution

- a) The national Government
- b) Provincial and metropolitan Councils and
- c) Local authorities, that is to say
- i) Urban Councils
- iii) Rural Councils"

In Zimbabwe, the history of local authorities has a tradition of support for economic, social and cultural rights since attaining independence.<sup>23</sup> The struggle for political liberation was inextricably linked to a struggle for material conditions of a dignified human existence.<sup>24</sup> Issues of gross decadent practices corruption poor corporate governance mismanagement of Council funds and resources, misplaced priorities, nepotism, tribalism among other misdemeanors have been the chief enemies in the provision of service delivery in Zimbabwe. Day in day out most of the local authorities are in the newspaper headlines for the wrong reasons and failure to exercise their key mandate and roles of service delivery. As a result local authorities in Zimbabwe have to large extend failed to deliver in the realisation of economic, social and cultural rights.<sup>25</sup> This is evidences by the poor state of roads, failure to provide clean affordable and portable water to the indigent and vulnerable members of society, failure to provide decent housing and food to the less privileged members of the society. This is far from the model in such countries such as Sweden, Denmark and Norway where the concept of rights cities is much more pronounced.

One of the most challenging issues in Zimbabwe is the right to water. It is common that supplies of water to households in Zimbabwe are erratic. The challenge also comes with the cutting of water supplies without notice or court orders at the residence of defaulters. This is despite the fact that some of the vulnerable are very young orphaned persons, the poor, the elderly and those living with a host of disabilities. This is despite the fact that some of these people can never raise the required amount due to the extreme poverty as a result of the economic crunch.

Water is life and it is submitted that arbitrary cutting of water supplies should be stopped. It is indeed Understood that local Authorities incur a lot of costs in the purchase of raw water, its treatment and its supply to various homes. It is however argued that local authorities can formulate policies to assist the less privileged members of society. This can be achieved by identifying such vulnerable groups then come out with a threshold to supply them certain basic gallons of water for free. Erratic disconnections of water supplies from residence without obtaining court orders first can have financial implications on Councils as evidenced in the case of <u>Lizzie Zvenyika and</u> 24 Others –v- the City of Gweru.<sup>26</sup>

Local authorities in Zimbabwe have the duty to incorporate economic, social and cultural rights in their policies. They should further demonstrate their competence of implementation and enforcement of these rights. The budgets at both national and local level should be tailor made to suit the needs of the residents in general in terms of the right to shelter, health, food, education water among others. There should also be budget provisions to cater for the vulnerable groups of society such as the indigent the elderly, unemployed, the sick, children and those living with disabilities. People are levied various taxes. A large portion of such money should be channeled towards economic, social and cultural rights through provision of social amenities, social services and service delivery in general instead of extravagant life styles for officials. Greediness knows no bounds and it has left many Council officials regretting their selfish attitudes against service delivery.

#### **Endnotes**

- See Bullard, A. (2008) Human Rights Crisis Georgia Institute of Technology Georgia pages 1-3.
   See also Symonides, J. (2000) Human Rights: Concept and Standards UNESCO Parks pages 3-5.
- 2. See Siraj, M. 91999) *Origin of Human Rights* University of East London page 4-5.
- 3. See Ado, K.M (2003) *International Law of Human Rights*University of Exeter Press Exeter pages 10-11.
  See also Smuts J.S. (2006) *Human Rights Law* Juta and company
  Ltd Pretoria pages 3-8
- 4. Being a lecture by Siraj. M. Sait on *International Human Rights law* on 29<sup>th</sup> April 1999 University of East London Law School.
- 5. See Rene, C (2007) *The Historical Imperative and Pragmatism: Human Rights: Comments and Interpretation* UNESCO London pages 2-5
  See also Well, H.E (1993) The Rights of man UNESCO London

pages 3-6 See also Evans, J. *Cultural and Social Diversity of Human Rights* Journal of the Commonwealth Magistrates and Judges' Association

Volume 15 Number 2 December 2003.

- 6. See the Bill of Rights provided for under Chapter 4 of the Constitution of Zimbabwe Amendment (No. 20) Act 2013.
- 7. Ibid

  The word "Justiciable" refers to the competence of courts to review a subject and enforce rights. Justiciable constitutional rights are enshrined in the Zimbabwe constitution under the Bill of Rights.
- 8. See the International Covenant on Economic, Social and Cultural Rights, adopted December 16, 1966

See also the Zimbabwe People's Charter, adopted at the people's Convention, Harare, Zimbabwe, February 9, 2008

See also Pandara, A. *The Constitution and the Economy: the Zimbabwe Experience* Legal Forum Volume 3 number 4 December 1991.

9. See ZLHR, "Economic, Social and Cultural Rights in Zimbabwe: Options for Constitutional Protections. International Human Rights Clinic and Harvard Law School 2008 pages 7-8.

The UDRH also provides, in Article 22, that, "Everyone, as a member of Society, has the right to social security and is entitled to realization, through national effort an international co-operation and in accordance with the organization and resources of each state, of the economic, social and cultural rights indiscipline for his dignity and the free development of his personality"

See also ACHPR, arts 15-17 and 22

See also ICESCR, arts 6-9, 11-13 and 15

See also Stevenson –v- Minister of Local Government and others 201 (1) ZLR 321(H)

10. See Chikwekwe, V.D (2012) A critique of Second Generation Rights In light of The Constitutional Reforms in Zimbabwe: A legal Perspective Mambo Press Gweru pages 46-47.

See also Molamu, B *Judicial Independence and Judicial Activism Amidst SOCIO-Economic Challenges* Journal of the Commonwealth Magistrates and Judges' Association Volume 15 Number 3 June 2004. page 20.

See also Evans, J.M. *Human Rights, Courts, Tradition and Social change* Judicial Journal volume 15 number 2 December 2003 pages 20-21.

See also Greyton, s (2205) *The History of Human Rights in South Africa* Claredon Press Durban pages 1-8.

See also Propotkin, P. the Bill of Rights in the New South African Constitution Legal forum volume 6 number 2 June 1994. See also Sachs, A 91990) Protecting Human Rights in New SA Oxford University Press Cape Town.

- 11. Ibid
- 12. Ibid
- 13. Ibid
- 14. Ibid
- 15. See Government of RSA-V- Grootboom 2001 (1) SA 46 (CC)
- 16. S.V. Makwanyane 1995 (3) SA 391 (CC)
- 17. Ibid
- 18. In re-certification of the Constitution of South Africa 1996 (10) BCLR 1253 (CC)
- 19. Ibid
- 20. Ibid
- 21. Ibid
- 22 Ibid
- 23. NTMC, Capacity Building for Local Government and Service Delivery Programme; Councillors' Induction Handbook 2013 pages 4-8.
- 24. Ibid
- 25. Ibid
- 26. See Lizzie Zvenyika and 24 Others-v-the City of Gweru

#### **CHAPTER 4**

## Specific Economic, Social and Cultural Rights to be Addressed by Local Authorities

#### 4.1 Introduction

In 2013 Zimbabwe ushered in a home grown Constitution with a justiceable comprehensive bill of rights. This is enshrined in Chapter 4 of the Constitution. There are entrenched provisions to fulfill economic, social and cultural rights. There are therefore primary obligations for access to resources both at national and local level. There are coherent arguments to assert rights and seeking remedies. The human rights dimension and realization of socio-economic rights is an important operational role of all local authorities.

There are questions to be addressed by local authorities. Some of the rights issues are in respect of pre-paid water systems in light of the right to water, arbitrary disconnection of water services without court orders, issue of arbitrary evictions and whether human rights have a bearing on local authorities<sup>1.</sup>

Section 44 of the Zimbabwe Constitution provides for the duty to respect fundamental human rights and freedoms. The state and every person including juristic persons, and every institution and agency of the government at every level must respect, protect, promote and fulfill the rights and freedoms set out in Chapter 4 of the Constitution. Councils are both juristic persons and institutions

which have the obligation to deliver services and address the economic social and cultural rights of its citizens<sup>2</sup>. Local authorities must give full effect to the rights and freedoms enshrined in the Bill of Rights. In doing so local authorities must take into account international law and all treaties and conventions to which Zimbabwe is a party. The following are some of the rights which local authorities must always address in-order to break from the past and usher in a new dispensation.

#### 4.2 Labour Rights

Local authorities employ a huge number of the labour force in Zimbabwe and worldwide. The Constitution provides that every person has the right to fair and labour practices and standards and to be paid a fair and reasonable wage or salary<sup>3</sup>. Salaries and wages should be commensurate with the tasks given and carried out by the employees. Every employee is also entitled to just, equitable and satisfactory conditions of work<sup>4</sup>.

All local authorities should be privy to the fact that their employees have a Constitutional right to form and join trade unions and employees or employer's organisations of their choice, and to participate in the lawful activities of those unions and organisations<sup>5</sup>. This implies that local authorities, as employers should not interfere with the democracy of workers<sup>6</sup>. The working environment in all Councils in the country must be conducive enough to allow every employee to participate in collective job action, including the right to strike, sit in, and withdraw labour<sup>7</sup>. The law may however restrict the exercise of this right in order to maintain essential services e.g

in the health, fire and ambulance services and any other critical areas.

Local authorities as employers have the right to engage employees in relevant pertinent issues. The workers have the right to engage in collective, organize themselves and form and join federations of their unions. Both women and men have a right to engage in collective bargaining, organize themselves and form and join federations of their unions<sup>8</sup>. Both women and men have a right to equal remuneration for similar work and hence should not be discriminated on grounds of sex. Over and above all women have a constitutional right to fully paid maternity leave for a period of at least three months.<sup>9</sup>

It is important to distinguish the right to work from labour rights.

"The right to work is a fundamental right...... essential for realising other human rights and forms an inseparable and inherent part of human dignity"<sup>10</sup>

At local authority or Council level the right to work is however not an "absolute and unconditional right to obtain employment".

Local authorities should endevour to create employment using the allocated resources for that purpose. As described by the International Labour Organization, the right to work is the "*main route out of poverty*" This is due to the fact that employment contributes to social and economic advancement. At local authority level preserving the eight to work contributes to the economic stability of the local residents. This is integral to achieving many other rights, including the right to attain an adequate standard of

living, the right to food, water, clean environment and the right to housing<sup>12</sup>.

#### 4.3 Right to Food and Water

Every person has the right to safe clean and portable water and sufficient food. <sup>13</sup> Local authorities are therefore implored to fulfill this right within the limits of their resources. The realisation of this right can be taken through measures to alleviate hunger especially in respect of the indigent and other vulnerable groups within the society <sup>14</sup>. Local authorities have to address this right in light of child headed families, the indigent, the elderly and those living with disabilities and the ill.

Hunger worldwide is a well-known component of extreme poverty. There are special groups in Local communities who live in extreme poverty. These groups are usually excluded from participating in economic life or unable to secure a livelihood and are most likely to suffer from food insecurity<sup>15</sup>. Certain vulnerable groups are economical dependent or may suffer from severe consequences from malnutrition. It is imperative that local authorities target and prioritise food aid for these vulnerable groups through tax levy, food aid, capacitation through self-help projects and provision of non-payment of threshold of safe, clean and portable water. This is amidst the fact that local authorities also incur certain costs in the treatment of raw water and its provision to all residents. Local authorities should therefore always address the right to food and water. Cutting of water services should be the last action. This should be sparingly done especially to those who are capable of paying and deliberately default and are unwilling to pay. The cutting

of water services should be done through a court order and not arbitrary.

#### 4.3 Shelter

It has been long established that the right to adequate shelter is universally recognised by the community of nations<sup>16</sup>. Zimbabwe is party of the global village and is not an exception in this regard. It follows that all local authorities, without exception, have some form of obligations in the shelter sector, as exemplified by their creation of housing and community services department and committees.

Local authorities have the obligation to formulate policies and channel funds towards the provision of shelter. Allocation of funds towards housing projects is key to the realisation of second generation rights. Even the poor people have a right to shelter. Local authorities therefore have a fundamental obligation to protect and improve houses and neighbourhoods, rather than damage or destroy them. The provision of low cost houses makes it affordable for the poor people to earn a decent living and should be part and parcel of Council progressive policies than arbitrary eviction<sup>17.</sup>

In addressing the housing issue local authorities should be privy to the fact that all people, by virtue of being human beings deserve the right to decent standards of living. It follows that access to adequate shelter is widely accepted as a basic human need<sup>18</sup>. This is due to the fact that shelter provides physical protection from the weather, offers personal security and satisfies psychological demands for individual space and privacy. In addition shelter establishes integral social functions by providing a gathering space for families, relatives,

friends and communities<sup>19</sup>. The right to shelter is also closely linked to environmental hygiene and the right to the highest attainable standard of health in line with acceptable international standards. This is in light of the fact that the right to shelter is contained in numerous international conventions, regional and national instruments.<sup>20</sup>

### 4.4 Right to Health Care

The Health care aspect is a fundamental human right indispensable for the exercise of other human rights. It follows that every human being is entitled to the enjoyment of the highest attainable standard of health conducive to living a life in dignity<sup>21</sup>. The constitution of Zimbabwe provides under section 76 that;

- 1) Every citizen and permanent residents of Zimbabwe has the right to have access to basic health care services, including reproductive health care services.
- 2) Every person living with a chronic illness has the right to have access to basic health care services for the illness.
- 3) No person may be refused emergency medical treatment in any health case institution.
- 4) The state must take reasonable legislative and other measures, within limits of the resources available to it, to achieve the progressive realisation of the rights set out in this section<sup>22</sup>"

It is trite that the right to health care fundamentally impacts upon the exercise of other human rights. Good health is so critical in human life in that it ensures that people of all ages and different backgrounds can participate in the economic, social and political processes of their communities<sup>23</sup>. This can be from the remotest area, village level, district, provincial and national level.

Local authorities must embrace the right to health in their policies. In light of this development virtually every local authority has a department with the mandate of looking into health issues. These underlying factors include safe affordable and portable water, proper and efficient sewer systems, a health environment, adequate sanitation and access to health-related information<sup>24</sup>.

In addressing health issues local authorities in Zimbabwe are persuaded to formulate health friendly budgets by allocating financial resources towards the health sector. Public health care facilities including staff should be capacitated and allocated sufficient resources in-order to boost an accessible, good quality and affordable health services. Enough drugs have to be procured in local authorities' hospitals and clinics. Financial resources can be through a health levy such as the AIDS levy at National level.<sup>25</sup> Coupled with these authorities should be on the forefront in disseminating information on health issues. This can be through outreach programmes, open day programmes, or the use of print and electronic media and promotion of updated health literature and awareness campaigns such as the TB or Typhoid alert campaigns and clean up campaigns. The promotion of drama and theatre in Council schools is also another vehicle in which local authorities in Zimbabwe can address health care issues. Success of local authorities can be best measured against their provision of health – care facilities as a key component of health service.

### 4.5 Right to Education

In any civilised society the right to education recognises the crucial role that education plays in the enhancement of human dignity<sup>26</sup>. The essence of protecting the right to education is geared at fully developing the human personality. It is common because education is a tool which promotes personal autonomy, self-esteem and pride. It helps to earn respect in society and build one's own confidence and integrity<sup>27</sup>. Good personalities and capabilities are products of sound basis of education. This is compounded by the fact that education strengthens an individual's cultural identity and committement to community values<sup>28</sup>. An educated citizen is in a better position to support his family, assert his civil and political rights and monitors or constructively criticise the actions of his government<sup>29</sup>.

It is not in dispute that at international and regional level education is both a human right in itself and an indispensable means of realising other human rights. On the same token it is an empowerment right which is the primary vehicle by which economically and socially marginalised adults and children can lift themselves out of poverty and obtain the means to participate fully in their communities<sup>30</sup>. Education also empowers women and safeguards children from exploitation in the labour market.<sup>31</sup>

At national level the right to education is so critical and is protected by the constitution. The constitution provides that;<sup>32</sup>

- 1) Every citizen and permanent resident of Zimbabwe has a right to
  - a) A basic state funded education, including adult basic education; and

<i>b</i> )	Further education which the state, through
	reasonable legislative and other measures,
	must make progressively available and
	accessible.

- 4) the state must take reasonable legislative and other measures, within the limits of the resources available to it, to achieve the progressive realisation of the right set out in subsection (i)"

Both urban and rural local authorities in Zimbabwe have a mandate to address the educational needs of the local residents. It is the duty of local authorities to ensure that educational institutions are available in sufficient quantity, and must contain adequate and appropriate infrastructure, must be of reasonable acceptable standard and must create a user friendly environment for learning.

In addressing the right to education local authorities are implored to ensure that educational provisions are accessible. This entails that educational institutions and programmes must be accessible to everyone, without discrimination. Those living with various forms of disabilities should be able to access educational facilities without any challenges. Infrastructure should be tailor made for easy access by anyone. Over and above all, education must be geographically accessible and free or affordable to all citizens.

Acceptability of the standard and quality of education is historically one of the components of benchmarking of service delivery by local authorities globally. This implies that the form and substance of education, including curricula and teaching methods must be relevant, sound, purposeful, culturally acceptable and of high quality. Society should be secure and confident of entrusting its children in the hands of those who teach a socially and culturally acceptable curricula.

Another aspect of the right to education which should be addressed by local authorities in their educational policies in Zimbabwe is that of the adaptability of the education system. This is in view of the fact that education has to be flexible so that it can in turn adapt to the needs of a dynamic or changing society<sup>33</sup>. In other words the education system provided in local areas must respond to the needs of students within their diverse social and cultural settings.

Local authorities in Zimbabwe have to address a host of other second generation rights enshrined in the bill of rights. The bill of rights is justiceable and one can petition the courts for redress where there is an alleged infringement<sup>34</sup>. An elaboration of some of the rights is provided for under part 3 of the declaration of rights<sup>35</sup>. It is submitted that all local authorities must take reasonable steps within resources available to address the economic, social and cultural rights of the local residents.

#### **Endnotes**

- 1. See in particular the case of *Lizzie Zvenyika and 24 others –v- Municipality of Gweru* HB 1435/15
- 2. See the Constitution of Zimbabwe Amendment (No.20) Act 2013 Chapter 2 and 14.
- 3. Op Cit note 3 Section 14, 24, 65 (6)
- 4. Op Cit note 3 Section 65 (4)
- 5. Op Cit note 3 Section 65 (5)
- 6. Op Cit note 3 Section 65 (2)
- 7. Op Cit note 3 Section 65 (3)
- 8. Op cit note 3 Section 65(5) (a)
- 9. Op Cit note 3 Section 65(7)
- 10. Op Cit note 3 Section 64
- 11. See International Labour Organisation" Working out of Poverty"
  International Labour Conference, 2003, p.68.
  See also Article 23 of the UDHR which states "Everyone has the right to work, to free choice of employment, to just and fovurable condition of work and to protection against unemployment
  ....."
- 12. Ibid
- 13. Op Cit note 3 Section 15 and 77

See article 25 of the UDHR which provides "Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food"

See also well. H. G (1993) *The Right of Man* UNESCO London pages 1-5

See also article 2 of the International Covenant on Economic, Social and Cultural Rights (ICESCR)

- 14. K. Moyo Just means, Just ends. Is starving a Nation for political gain a crime against humanity? 2003 University of Zimbabwe Dissertation.
  See also WFP Agencies warn that food AID needs in Southern Africa Remain substantial www.wfp.org
  See also BBC World, Starvation Strikes Zimbabwe, 3rd May 2002.
  See also World food Program: Southern Africa Hunger Reports June 2002, www.wfp.org
- 15. See WFP Agencies warn that food aid needs in Southern Africa
  Remain substantial www.wfp.org
  See also WFP Southern Africa Hunger report June 2002
  www.wfp.org
- See global strategy for shelter to the Year 2000, adopted December, 16. 1991. UN Doc A/Res /46/163 (1991) The right to housing is also recognized in numerous other international human rights treaties, declarations and resolutions including; united National Declaration on Social Progress and Development (1969), part ii, art.10; Declaration on the rights of disabled persons (1975), art. 9; United Nations Vancouver Declaration on Human Settlements (1976), section 111 (8); International Labour Organization (ILO) Recommendation No. 115 ((1961) principle 2; ILO No. 62 concerning older workers (1980); art .5 (g) declaration on the right to development (1986) art 8 (1); United Nations sub-Commission on the Prevention of discrimination and protections of minorities, Resolution 1994/8; "Children and the Right to adequate housing; adopted AUGUST 23, 1994; United Nations Commission on Human Rights, Resolution 1993/77, "Forced Evictions" adopted March 10, 1993; United Nations commission on Human Settlements, resolution 14/6; "the Human Right to Adequate Housing," adopted May 5, 1993; United Nations General Assembly, Resolution 42/146, Realisation of the right to Adequate Housing," adopted December 7, 1987

- See also office of the United Nations High Commissioner for Human Rights "The human Right to Adequate Housing", fact sheet No.2.1 available at <a href="http://www.unhchr.ch/html/menu6/2/fs 21.htm">http://www.unhchr.ch/html/menu6/2/fs 21.htm</a>
  See also Committee on Economic, Social and Cultural Rights, General Comment No. 4 The Right to Adequate Housing, 6<sup>th</sup> sess, 1991, para.7at <a href="http://www.unhchr.ch/tbs/doc.ncf">http://www.unhchr.ch/tbs/doc.ncf</a>.
- 17. Op Cit note 3 Section 28

  See also Global Strategy for shelter to the year 2000

  See also Theo R.G Van Banning. *The Human Right to Property*(Antwerpen: Intersentia, 2002) p 85

  See also *Government of RSA-v- Grootboom* 2001 (1) 46(cc)
- 18. See "Housing Policy Built on a Foundation of Failures and lies"
  Association of Zimbabwe Journalists, September 11, 2006 available at http://www.zimbajournalists.com.
  See also Human Rights Watch, Zimbabwe- Evicted and Forsaken.
  November 30, 2005, available at http://www.hrw.org/en/node/11512/section/2.
  - See also Amnesty International, "Zimbabwe: No Justice for the victims of forced Evictions", September 8, 2006. Available at http://www.amnesty.org/en/library/asset/ArR46/005/2006/en/dom.
- 19. See International Displacement Monitoring Centre, "The many faces of Displacement: IDPs in Zimbabwe;" August 2008, available at http:www.internal-dispalcemnet.org.

  See also. "Urgent appeal on ongoing forced eviction and destruction of Housing Settlement Throughout Zimbabwe" ZLHR press release, June 7, 2005, available at http://www.Kubatana.net/html/archive/hr/050607 zlhr.asp?sector.
- 20. See, article 25 of the UDHR which recognise that "everyone has the right to a standard of living, adequate for the health and well-being of himself and his family, including food, clothing housing and medical care and necessary social services and the right to

security in the event of unemployment, sickness, disability other lack of livelihood in circumstances beyond his control".

See also the related right to private property ownership which is articled in article 17 UDHR, which provides that "everyone has the right to own property alone as well as in association with others" and that "no one shall be arbitrarily deprived of his property."

See also the following Zimbabwe cases pertinent a property rights; *CFU-v- Mhuriro and Others* 2000 (1) ZLR 4-5(S) *CFU-V- Minister of land and others* 2000 (2) ZLR 469 (S)

Minister of lands and Agriculture -v- Fick LA HH 370-99.

21. Op Cit note 3 Sections 29 and 76 See also General Comment No. 14 at paras 33-37

See also ICESCR, art 12.

The right to health is also recognised in numerous international human rights treaties and declarations including; the 1965 International Convention on the Elimination of All forms of Racial Discrimination (Art.5 (e) (iv); the 1978 Declaration of Alma. Ata (Arts. 5 and 7); the 1979 Convention on the Elimination of all forms of Discrimination against Women (Art. 11(1) (f), 12 and 14 (2) (b); the 1989 convention on the Rights of the Child (Art 24).

- 22. Ibid
  - See also the 2000 United Nations Millennium Declaration and Millennium Development Goals and the 2006 Convention on the rights of persons with disabilities (Art:25)
- 23. Committee on Economic Social and Cultural Rights, General Comment No. 14. *The Right to the Highest Attainable Standard of Health*, 22<sup>ND</sup> SESS, 2000, PARA.1.
- 24. See also *Minister of Health –v- Treatment Action Campaign* 2002 (5) SA 721(CC)

See also Annas, G. "The Right to Health and the Nevirapine case in South Africa" in Sofia Gruskin et al, Perspectives on Health and Human Rights (Sofia Gruskin ed, 2005) p498.

See ZLHR, "Economic, Social and Cultural Rights in Zimbabwe" International Human Rights Clinic and Harvard Law School pages 54-57

See also, Article 25 of the UDHR which states that "Everyone has the right to a standard of living and equate for the health and wellbeing of himself and his family, including food, clothing, housing and medical care"

See also WHO, "the Right to Health", fact sheet No. 31 available at <a href="http://www.ohchr.org">http://www.ohchr.org</a>.

See also Perelman" lawyering for the right to Health in Africa: the tale of two legal resources centre" paper presented at the annual meeting of the law and society, J.W. Marriot Resort, Las Vegas, NV, October 10, 2008.

- 25. See United Nations General Assembly; "Report on HIV and AIDS: Follow up to the Declaration of commitment on HIV/AIDS;"

  January 2006 –December 2006 page 4

  See also World Health Organisation, "Zimbabwe Country Profile

  June 2007" page 1
- Op cit note 3 section 27 and 75
  Op cit note 24 ZLHR page 61
  See also Committee on Economic, Social and Cultural Rights,
  General comments No.13.
  The Right to Education, 21st sess.1999 para.1.
- 27. Ibid
- 28. Ibid
- 29. Ibid
- 30. Ibid

See also Barro, RJ" Economic Growth in a Cross Section of Countries" *Quarterly Journal of Economics* Vol. 106.No. (1991) See also Gumbi A. *A Critique of the Education System in Zimbabwe* International Transparency Zimbabwe 17 June 2009. See also Nyamurundira, R *The Right to Education: A Legal Right*. Zimbabwe Human Rights Bulletin. Issue Number 12 March 2005. See also *Brown –v- Board of Education of Topeka* 1954 347 US483

- 31. See Mason, D. M (1991) *Human Rights for ALL: Education Towards A Rights Culture* Juta and Company Ltd Kenwyn See also UNICEF, "Zimbabwe's ground-breaking plan for girls and orphans and vulnerable children's education," accessible at http://www.unicef.org.
  - See also Summers. L. H, "Investing in All the People: Educating women in developing Countries, "Economic Development Institute Seminar Paper, No- 45. (Washington, D.C. World Bank. 1994)
- 32. Op Cit note 3 Section 76
- 33. Ibid
- 34. The word "justifiable" refers to the competence of courts to review a subject and enforce. Justifiable constitutional rights are usually contained in a bill of rights as in Zimbabwe and South Africa or similar document which the nation's courts are empowered to enforce. Non-justifiable rights are sometimes contained in an "objectives" or "Principles" section of the constitution, which courts are explicitly prohibited from enforcing.
- 35. Op Cit note 32.

#### **CHAPTER 5**

# Summaries and Analysis of Relevant Case Law on Economic, Social and Cultural Rights

The judiciary plays a leading role in the protection and enforcement of basic human rights and freedoms. Its role is not restricted to providing redress to violations of human rights but also to interpret and expand the scope of human rights in accordance with the national Constitution of Zimbabwe 2013 as well as the growing body of international human right norms<sup>1</sup>. These two roles on adjudication and creativity are crucial for the effectiveness of the judiciary as the guardian of basic human rights and freedoms<sup>2</sup>.

It is important to note that the judiciary may not accomplish its role unless the aggrieved parties have the means and capacity to enforce their rights. The courts cannot *mero motu* bring cases to court and hear them. In Zimbabwe effective enforcement of human rights in courts is hampered by the high cost of legal services to the most vulnerable people, complexity of litigation and the complex rules of court and procedural restriction on the right to bring actions in court<sup>3</sup>. These constraints affect the poor and vulnerable groups more adversely than the rich and affluent.

Case law is very important in the protection and enforcement of basic human rights and freedoms in Zimbabwe and worldwide<sup>4</sup>. In other words judicial precedent is recognised as a source of the law in Zimbabwe and world wide<sup>5</sup>. Judicial precedent is recognised as a source of the law in Zimbabwe. It is a fundamental legal principle that in all legal process, as in all human

affairs, there is a natural inclination to regard the decisions of the past as a guide to the actions of the future. This is also known as the doctrine of precedent<sup>6</sup>. This implies that the maintenance of the certainty of the law and equality before it, entail general duty of judges and magistrates to follow legal rulings in previous judicial decisions<sup>7</sup>. This will in turn enrich judicial jurisprudence through precedent found in previous cases. Case law is therefore significant in the interpretation and enforcement of economic, social and cultural rights in Zimbabwe. Since the ushering in of the new Constitution of Zimbabwe 2013 and the establishment of the constitutional court there are not many cases which have been derided on violation and redress in terms of second and third generation rights. Besides Constitutional avoidance by the superior courts, not many people have petitioned the courts in terms of the economic, social and cultural rights. As a result there is not much test or leading cases in Zimbabwe and courts and legal schools tend to rely on South African and international cases for guidance and precedent. This is despite the new constitutional dispensation. The following are summaries of decided cases in various jurisdictions, which map up a legal trajectory and improve legal jurisprudence in terms of economic, social and cultural rights.

#### 5.0 ZIMBABWEAN CASES

## 5.1 Lizzie Zvenyika and 24 Others -v- Municipality of Gweru<sup>8</sup>

In this case the applicants petitioned the high court after enforcement officers from Gweru City Council disconnected water supplies from the residencies of the applicants without obtaining court orders first. The applicants in their heads of arguments filed of record argued that water was a basic right and that Gweru City Council had not

only taken the law in its own hands, but also violated their constitutionally protected right to water. The matter was set on an unopposed roll due to the fact that City of Gweru did not oppose the application. It was really unfortunate on the part of the Council since a default judgment was entered against it. This meant the case was not decided on the merits but rather on a technicality. Crucial issues articulated in the application were therefore not challenged by the defendant nor articulated by the court. This is in light with the rights of the residents as one hand and the fact that City of Gweru should also incur financial costs in the treatment and supply of water.

### 5.1.2 Mushoriwa -v- City of Harare<sup>9</sup>

City of Harare sent to applicant a bill of water which was flatly disputed. Nonetheless, the Council without any further ado disconnected water supplies to the applicants' premises. This prompted him to file an urgent chamber application for an order directing the council to restore water services pending resolution of the dispute by the court. Among issues raised was the declaration of rights to water enshrined in section 77 of the Constitution of Zimbabwe 2013 and the municipality by law authorising council to cut off water even if the bill is in dispute. The argument was whether the by law was contrary to the spirit of the Constitution or not.

It was held that the right to water is a fundamental right enshrined in section 77 of the Constitution of Zimbabwe 2013. Under section 44 of the Constitution the state and every institution and agency of the government at every level must, respect, protect and fulfill the right and freedoms set out in the declaration of rights. The Council, as a public body and institution of local government, cannot deny citizens water without just cause. It was further held that Section 8 of the water regulations contradicts both the constitution and the enabling statute in more respects than one.

The regulations were held to be in violation of the Constitution of Zimbabwe in that they authorized the council to arbitrary deprive citizens of their fundamental right to water without compensation. Firstly this is contrary to section 85 of the Constitution which entitles an aggrieved person to appropriate compensation whenever this fundamental human rights have been violated. Secondly the regulation (c) violated the Constitution in that in the case of a disputed bill, it unlawfully confers the respondent City of Harare Council with the sole jurisdiction to arbitrarily determine the dispute without recourse to the course of law. This in itself is contrary to paragraph 69 of the Third Schedule of the enabling Act the Urban Councils Act (Chapter 29:15) as read with section 165 (1) (c) of the Constitution. Bhunu J. (as he then was) noted that by so doing, the by law allows the Council to be the sole arbiter in its own case, contrary to the well-established common law maxim that no one should be a judge in his own cause. He further emphasised that while Council has a right to collect its debts, it cannot do so by resorting to unlawful means, for every person, including Council is subject to the law.

It is hereby submitted that the essence of misjudgment gives a temporary relief to defaulters. It also implies that Council should first seek recourse in the courts before any disconnection. It also means that it is unlawful for a Council to disconnect water from its residents without a court order. It is however common cause that, despite directions by superior courts many local authorities are in the habit of disconnecting water supplies from defaulting residents without following due legal process. This absolutely sounds bad in law and in fact because most vulnerable groups which cannot afford high legal costs end up being victims.

#### Hove -v- City of Harare<sup>10</sup>

This case involved the right to water as in the case of <u>Mushoriwa –v- City of Harare</u><sup>11</sup>. The applicant, T.K Hove owned a property situated in Harare. Hove was threatened with water disconnection by City of Harare the respondent. This was after he had repeatedly failed to pay his water bill. Sensing that the imminent threats were likely to be real the applicant approached the High Court claiming the right to water, as stated in section 77 of the Constitution of Zimbabwe would be infringed if the respondent were to proceed with its threats. He sought an interdict. On the other hand the respondent opposed the application and argued that disconnections were the only way council can collect revenue to provide the essential service of water.

It was held by Muremba. J. that the right to water under section 77 of the constitution does not prohibit disconnections of water services for-non-payment provided that the disconnection is not arbitrary. It was held further that where water charges are genuinely disputed, it would be contrary to

Section 77 of the Constitution to disconnect water supplies without affording the consumer a reasonable opportunity of redress through the courts. In *casu*, Muremba J, held further that the applicant was not genuine and a disconnection without a court order would not infringe his right to water.

The Judgment by Muremba J. Hove –V- City of Harare seem to differ materially with that of Bhunu J. (as he then was)<sup>12</sup>. Their interpretation of Section 77 of the Constitution and the water regulations of City of Harare are materially different. Muremba, J, seems to have departed from the earlier judgment. According to Mushoriwa (Supra) no matter how genuine or not genuine the defaulter is, the aggrieved part cannot take the law into his own hands and disconnect water supplies without approaching the courts first for redress. <sup>13</sup> This is distinguished with the view by Muremba J. who is of the view that the aggrieved part can actually proceed to disconnect water supplies without seeking a court order first where the defaulting party is not genuine. The question is who determines whether the defaulting party is genuine or not? If it is the council, it then means the maxim that no man is a judge in his own case does not apply. It also means Council has the right to determine whether the defaulter is genuine. If it is of the view that the defaulter is not genuine in his dispute of the water bill it can proceed to disconnect water supplies without a court order. That is the essence of the Hove (supra) judgment which is a departure from the Mushoriwa (supra) judgment.<sup>14</sup> Both cases are High Court cases and a Supreme Court or Constitutional judgment would give real direction without conflict.

## 5.1.3 Nyamande & Anor -v- Zuva Petroleum (PVT) Ltd (1)<sup>15</sup>

The appellants' employment contracts were terminated on notice, as provided in their contracts of employment, and were paid cash in lieu of notice. An arbitrator considered that the termination was unlawful because it had not been in terms of a Code of Conduct, but the Labour Court allowed an appeal by the respondent, the employer. It held that neither Section 12(4) nor Section 12(b) of the Labour Act [Chapter 28:01] abolished the employer's right to terminate employment on notice. On appeal to the Supreme Court, it was agreed that at one time both the employer and the employee had a common law right to terminate an employment relationship on notice.

(1) It was held that common law right in respect of both the employer and the employee could only be limited, abolished or regulated by an Acts of Parliament or a Statutory Instrument that is clearly *intra vires* an Act of Parliament. It is also a well-established principle of statutory interpretation that a statute cannot effect an alteration of the common law without saying so explicitly. Applying the golden rule of statutory interpretation-that words be given their primary meaning there were no words in Section 12(b) of the Act that either expressly or by necessary implication abolished the employer's common law right to terminate an employment relationship by way of notice. Section 12 (b), as the main heading of that Section reveals, deals with dismissal following misconduct proceedings. The Section also sets out in some detail what constitutes unfair labour

- practice, which it outlaws. Termination of employment on notice is not among the conduct that Section 12B of the Act outlaws as unfair labour practice.
- (2) Section 8 of the Act sets out in some detail conduct that is outlawed as unfair labour practice. Termination of employment on notice is not among the conduct outlawed by Section 8.
- (3) Section 23 (b) deals with the method of termination of employment known as "dismissal". While dismissal is one method of termination of employment, it is not the only method. It is one of several methods of terminating employment. Another is retrenchment. Where the relationship between the employer and the employee has deteriorated to untenable levels through no fault of either party the relationship can be terminated. Section 12(b) of the Act does not deal with the general concept of termination of employment. It concerns itself with termination of employment by way of dismissal in terms of a Code of Conduct. It sets out that which must be followed or done in terms of either an employment Code of Conduct or a National Code of Conduct. It does not concern itself with termination of employment by ways other than dismissal.
- (4). Section 12 (4) deals with the concept of termination of employment on notice in terms of a contract of employment. It regulates the period of notice, setting out the time periods that apply when employment is being terminated on notice.

The notice periods do not apply when an employee is dismissed, as in such event no notice is required. Section 12(4) explicitly applies to both the employer and the employee. There was no possible reason why, despite the explicit language of the Section it should apply to the employee only and not to the employer, or why the Section should exist to regulate a non-existent right. The Subsection could only have meaning if there was a substantive right, in this case the common law right to terminate employment on notice, to which it pertained. This is especially so when one considers that all that Section 12(4) does is to facilitate the exercise of an existent common law right.

Following the pronouncement of the judgment many employees lost their jobs. There was public outcry in the whole of Zimbabwe. This adversely affected the socio-economic rights of the employees and their families. The unprecedented lay off of employees prompted legislative intervention. Section 12 of the Act was amended by Act 5 of 2015 (which came into effect on 26 August 2015, the date of this judgment) to state that no employer shall terminate a contract of employment on notice except where (a) the termination is in terms of an employment code, or (b) both parties mutually agree, or (c) the contract is for a fixed duration or for the performance of some specific service, or (d) pursuant to retrenchment. An urgent application by the employees to appeal to the Constitutional Court was dismissed on 1 August on the grounds of lack of urgency and because there was no right to appeal from the decision of the Supreme Court. No constitutional issues had been placed before that Court.

## Joyce Teurai Mujuru -v- The President of Zimbabwe and Others<sup>16</sup>

An application was brought before the Constitutional Court of Zimbabwe by one Joyce Mujuru a leader of an opposition party-challenging the validity of a Presidential decree that introduced bond notes. The Constitutional Court made a ruling on procedural points raised by the respondents without looking into the merits of the application before it. The point raised by the respondents was that applicants should first challenge the Presidential (Temporary Measures) Powers Act under which the President acted to introduce the bond notes.

In their unanimous decision, the nine judges felt there was no justification of implicating the President on the basis that he breached the Constitutional application. The matter was struck off the roll with costs. It is submitted that the issue before the court was important in the national interest and should not have been struck off the roll on a technicality. It is further argued that by not getting into the merits of the application the Constitutional Court exercised "Constitutional avoidance" in a matter perceived to be of a sensitive political nature. That in turn left issues hanging.

#### 5.2 SOUTH AFRICAN CASES

## 5.2.1 S V Makwanyane<sup>17</sup>

This case examined the changes in the interpretation and adjudication of the law in South Africa which has changed dramatically since the inception of the new dispensation. Though it involved a criminal case the judgment has a significant bearing on all sets and generations of rights. A

literal, textual approach in the apartheid era had been replaced by a contextual purposive approach. In *casu*, it was stated that "the Constitution makes it particularly imperative for Courts to develop the entrenched fundamental rights in terms of a cohesive set of values ideal to an open and democratic society"

The values stated in Section 1 of the South African Constitution include human dignity, the achievement of equality and the advancement of human rights and freedoms, non-racialism, non-sexism, supremacy of the constitution and the rule of the law.

#### 5.2.2 Soobramoney -v- Minister of Health, Kwazulu-Natal<sup>18</sup>

In this case the South African Constitutional Court first had to determine whether the right in section 27 (**the right to have access to health care, food and water**) was violated. Then it had to determine what emergency medical treatment amounted to for the purpose of section 27 (3). Thirdly the Constitutional Court had to decide which criteria had to be used to determine the availability of resources.

It was held that a person suffering from chronic renal failure and requiring dialysis twice or three times a week to remain alive was not an emergency calling for immediate remedial treatment. It was an ongoing or chronic state of affairs resulting from an incurable deterioration of the applicants' renal function. Therefore Section 27 (3) did not give such

a person the right to be admitted to the dialysis programme at a state hospital. The vital issue was the extent of the resources available for the realisation of these rights. If the South African economy begins to grow meaningfully, the state will have more resources to finance socioeconomic rights. However managerial expertise will always be required to ensure that the resources are used optimally.

## 5.2.3 Government of the Republic of South Africa – v-Grootboom<sup>19</sup>

This case focused on Section 26 of the South African Constitution, which provides that everyone has the right to have access to adequate housing. In this regard, the state is obliged to take reasonable legislative and other measures within its available resources, to achieve the progressive realisation of this right (s 26 (2)). In terms of Section 26 (3), no one may be evicted from their homes or have their homes demolished without an order of Court made after considering all the relevant circumstances. It is important to note that Section 26 recognises "a right to have access to adequate housing" as opposed to "a right to adequate housing". This distinction makes it clear that there is no unqualified obligation on the state to provide free housing on demand for all members of the public.

The Constitutional Court the measures of the government to provide housing to be inadequate,, since no provision was made for temporary shelter for homeless people. This omission was unreasonable, since it ignored those most in need. The Constitutional Court adopted the standard of reasonable. Reasonable is therefore the yardstick for the evaluation of the legislative programme and its implementation. In this regard, the Constitution Court held as follows:

Legislative measures by themselves are not likely to constitute constitutional compliance. The state is obliged to achieve the intended result and the legislative measures will invariably have to be supported by appropriate well-directed policies and programmes implemented by the executive. The policies and programmes must be reasonable both in their conception and implementation. The formulation of the programme is only the first stage in the meeting of the state's obligation. The programme must also be reasonable implemented. An otherwise reasonable programme that was not implemented reasonably will not constitute compliance with the state's obligations. This means that the court can require the state to give a comprehensive explanation of the measures adopted to fulfill the socio-economic rights in question.

# 5.2.4 Minister of Health -v- Treatment Action Campaign<sup>20</sup>

The TAC case is a significant decision of the Constitutional Court in dealing with socio economic rights. It dealt with the issue of the governments duty to provide HIV-positive, pregnant women with the antiretroviral drug called Nevirapine to lower the risk of mother to child transmission of the virus during childbirth.

Section 27 (1) of the Constitution stipulates that everyone has the right to have access to health care services (including reproductive health care) sufficient food and water, and social security. Everyone also has the right to have access to appropriate social assistance if they are unable to support themselves and their dependants. In terms of Section 27(2), the state is obliged to take reasonable legislative measures, within its available resources, to achieve the progressive realisation of these rights. Finally Section 27 (3) provides that no one may be refused emergency medical treatment.

In this case, the respondents requested that the drug, Nevirapine, should not be available at research and training sites only, but also in public hospitals and clinics. The Constitutional Court found the state's policy in this regard to be unconstitutional, as it did not fulfill the health-care and other guarantees in the Bill of Rights. The Court also rejected the state's argument that the court was infringing the principles of separation of powers and said that orders that have the effect of altering policy are the courts obligation where the Constitution is being infringed.

The Court concluded that the state had not met its constitutional obligations and ordered it to remove the restrictions preventing Nevirapine from being made available at public hospitals and clinics that were not research sites. It found that there was no reason why the state could not continue to collect data and closely monitor

the use of Nevirapine at its chosen pilot sites. There was no reason that prevented state from providing the drug at other birthing institutions where facilities existed for doing so. The state was also ordered to take reasonable measures to extend testing and counseling throughout the public health sector to facilitate the use of Nevirapine, as there was a pressing need to ensure that the loss of lives was prevented, according to the Court.

### 5.2.5 Mazibuko -v- City of Johannesburg<sup>21</sup>

The recent decision of the South African Constitutional Court dealt with the interpretation of Section 27(1) (b) of the Constitution, which provides that everyone has the right to have access to sufficient water. The case concerned two major issues:

- 1. Whether the City of Johannesburg's policy in relation to the supply of free basic water and particularly, its decision to supply six kilolitres of free water per month to every account holder in the city (the Free Basic Water Policy) was in conflict with Section 27 of the Constitutional or Section 11 of the Water Services Act.
- 2. The second major issue was whether the installation of prepaid water meters by the first and second respondents in the Phiri area was lawful. After careful consideration of the issues, the Court found that the City's free Basic Water Policy fell within the bounds of reasonable and therefore was not in conflict with either Section 27 of the Constitution or with the national legislation.

The Court mainly confirmed the approaches followed in the Grootboom and TAC cases, specifically in relation to the test of reasonableness and the nature of Socio-economic rights.

The following paragraphs are specifically relevant:

- "[65] The orders made in these two cases [Grootboom and TAC] illustrate the Court's institutional respect for the policy-making function of the two other arms of government. The Court did not seek to draft policy or to determine its content. Instead having found that the policy adopted by government did not meet the required constitutional standard of reasonable, the court in Grootboom, required government to revise its policy to provide for those most in need and, in treatment Action Campaign No. 2, to remove anomalous restrictions.
- [66] The Constitution envisages that legislative and other measures will be the primary instrument for the achievement of social and economic rights. Thus it places a positive obligation upon the state to respond to the basic social and economic needs of the people by adopting reasonable legislative and other measures. By adopting such measures the rights set out in the constitution acquire content, and that content is subject to the Constitutional standard of reasonableness.
- [67] Thus the positive obligations imposed upon government by the social and economic rights in our constitution will be enforced by courts in at least the following ways. If government takes no steps to realise the rights the courts will require government to take steps. If government's adopted measures are unreasonable, the courts will similarly require that they be

reviewed so as to meet the constitutional standard of reasonableness. From Grootboom it is clear that a measure will be unreasonable if it makes no provision for those most desperately in need. If government adopts a policy with unreasonably limitations or exclusions, as in Treatment Action Campaign No 2, the Court may order that those are removed. Finally, the obligation of progressive realization imposes a duty upon government continually to review its policies to ensure that the achievement of the right is progressively realized.

## With regard to the nature of socio-economic rights and litigating regarding such rights, the Court stated:

- [159] The outcome of the case is that the applicants have not persuaded this Court to specify what quantity of water is "sufficient water" within the meaning of Section 27 of the Constitution. Nor have they persuaded the Court that the City's policy is unreasonable. The applicants submitted during argument that if this were to be the result, litigation in respect of the positive obligations imposed by social and economic rights would be futile. It is necessary to consider this submission.
- [160] The purpose of litigation concerning the positive obligations imposed by social and economic rights should be to hold the democratic arms of government to account through litigation. In doing so, litigation of this sort fosters a form of participative democracy that holds government accountable and requires it to account between elections over specific aspects of government policy.

- [161] When challenged as to its policies relating to social and economic rights, the government agency must explain why the policy is reasonable. Government must disclose what it has done to formulate the policy: its investigation and research, the alternatives considered, and the reasons why the option underlying the policy was selected. The Constitution does not require government to be held to an impossible standard of perfection. Nor does it require courts to take over the tasks that in a democracy should properly be reserved for the democratic arms of government. Simply put, through the institution of the courts, government can be called upon to account to citizens for its decisions. This understanding of social and economic rights litigation accords with the founding values of our Constitution and, in particular, the principles that government should be responsive, accountable and open.
- [162] Not only must government show that the policy it has selected is reasonable, it must show that the policy is being reconsidered consistent with the obligation to "progressively realise" social and economic rights in mind. A policy that is set in stone and never revisited is unlikely to be a policy that will result in the progressive realisation of rights consistently with the obligations imposed by the social and economic rights in our Constitution.
- [163] This case illustrates how litigation concerning social and economic rights can exact a detailed accounting from government and, in doing so, impact beneficially on the policy making process. The applicants, in argument, rue the fact that the City had continually amended its policies during the course of the litigation. In fact, that consequence of the litigation (if

such it was) was beneficial. Having to explain why the Free Basic Water Policy was reasonable shone a bright, cold light on the policy that undoubtedly revealed flaws. The continual revision of the policy in the ensuing years has improved the policy in a manner entirely consistent with an obligation of progressive realisation".

#### **Endnotes**

- See generally provisions of the Constitution of Zimbabwe
   Amendment (No. 20) Act 2013
   See also ZLHR Economic, Social and Cultural Rights in Zimbabwe; Options for Constitutional Protections IHRC and Harvard Law School pages v-vi.
- 2. Mdamu, B *Judicial Independence and Judicial Activism Amidst Socio-Economic Challenges* Journal of the Commonwealth Magistrates and Judges Association Volume 15 Number 3<sup>rd</sup> June 2004 page 42.
- 3. See Nherera, P (1993) Constitutionalism and Human Rights: Challenges of Democracy Nordic Human Rights Publications pages 3-7
- 4. Mdamu op cit note 2 pages 42-44.
- 5. See Madhuku, L. (2010) *An Introduction to Zimbabwean Law* Harare page 33.
- 6. Ibid
- 7. Ibid
- 8. See Lizzie Zvenyika and 24 Others -v- Municipality of Gweru HB 1435/15
- 9. See Mushoriwa -v- City of Harare 2014 (i) ZLR 515 (H)
- 10. See Hove -v- City of Harare HH 205/16
- 11. See Mushoriwa -v- City of Harare (Supra)
- 12. See Hove -v- City of Harare (Supra)
- 13. See Mushoriwa -v- City of Harare (Supra)
- 14. See Nyamande and Anther -v- Zuva Petroleum (Pvt) Ltd (1) S43/15
- 15. See Joyce Teurai Mujuru –v- The President of Zimbabwe and Others CCZ 75/16
- 16. S –v- Makwanyane 1995 (3) SA 391(CC)

- 17. See *Soobramoney -v- Minister of Health Kwazulu Natal* 1998 (1) SA 765
- 18. See Government of the republic of South Africa –v- Grootboom 2001 (1) SA 46 [CC]
- 19. Minister of Health Treatment Action Campaign 2002 (5) SA 721 (CC)
- 20. Mazibuko -v City of Johannesburg CC T/39/09